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No. 01-

IN THE

Supreme Court of the United States

DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act (the "Act") establishes the ground rules for claims against a foreign state and, also, an "agency or instrumentality of a foreign state." 28 U.S.C. §§ 1330(a), 1603(a). The Act grants a foreign state or its agency or instrumentality the right to remove an action against it to federal court, immunity from suit absent an exception for certain types of claims and, in those cases where a lawsuit can be brought, certain substantive and procedural protections. *Id.* §§ 1330(a), 1441(d). The term "agency or instrumentality of a foreign state" is defined in pertinent part as "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state. . . ." *Id.* § 1603(b)(2). Because the State of Israel at all relevant times held a majority ownership interest in Petitioners Dead Sea Bromine Company Ltd. and Bromine Compounds Limited by owning virtually all of their parent corporation's stock, Petitioners assert that each of them is an "agency or instrumentality of a foreign state" pursuant to § 1603(b)(2) and that the district court therefore had subject matter jurisdiction under the Act.

The single question presented is whether the Act's definition of "agency or instrumentality" requires direct ownership by the foreign state, or whether an entity that is majority owned by the foreign state through one or more tiered subsidiaries is an entity "a majority of whose shares or other ownership interest is owned by a foreign state" within the meaning of 28 U.S.C. § 1603(b)(2).

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Dead Sea Bromine Company Ltd. and its wholly owned subsidiary, Bromine Compounds Limited, each of which was joined as a third-party defendant in this action. Dead Sea Bromine Company Ltd. is a wholly owned subsidiary of Israel Chemicals Limited, a corporation organized under the laws of Israel that has issued shares to the public. The majority shareholder of Israel Chemicals Limited is The Israel Corporation, which is organized under the laws of Israel and has also issued shares to the public.

The Respondents are the plaintiffs below:

Gerrardo Dennis Patrickson
Rodolfo Bermudez Arias
Benigno Torres Hernandez
Fernando Jimenez Arias
Santos Leandros
Herman Romero Aguilar
Elias Espinoza Merelo
Hooker Era Celestino
Alirio Manuel Mendez
Carlos Humberto Riveral

The defendants in this litigation, who are also Respondents, are:

Dole Food Company, Inc.
Dole Fresh Fruit Company
Dole Fresh Fruit International, Limited
Pineapple Growers Association of Hawaii
Amvac Chemical Corporation
Shell Oil Company
Dow Chemical Company

Occidental Chemical Corporation, individually and as successor to Occidental Chemical Company, Occidental Chemical Agricultural Products, Inc., Hooker Chemical and Plastics, Occidental Chemical Company of Texas and Best Fertilizer Company
Standard Fruit Company
Standard Fruit and Steamship Company
Standard Fruit Company De Costa Rica, S.A.
Standard Fruit Company De Honduras, S.A.
Chiquita Brands, Inc.
Chiquita Brands International, Inc.
United Brands Company, Inc., as successor to Chiquita Brands International, Inc.
Maritrop Trading Corporation
Del Monte Fresh Produce, N.A.
Del Monte Fresh Produce Hawaii, Inc.
Del Monte Fresh Produce Company
Fresh Del Monte N.V.

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Dead Sea Bromine Company Ltd. ("Dead Sea Bromine") and Bromine Compounds Limited ("BCL") (collectively, the "Dead Sea Companies" or "Companies") petition for a writ of certiorari to review the judgment and opinion of the U.S. Court of Appeals for the Ninth Circuit. The court below held that the Companies are not agencies or instrumentalities of the State of Israel under the Foreign Sovereign Immunities Act, in direct conflict with the contrary holding of the U.S. Court of Appeals for the Fifth Circuit in *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001).

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 251 F.3d 795 (9th Cir. 2001) and is in the Appendix at 1a (hereinafter "A.__"). The district court's principal opinion is at A.55a. It denied rehearing in an order at A.49a; dismissed the action for *forum non conveniens* in an order at A.34a; and denied rehearing of that order in an order at A.27a.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on May 30, 2001, and entered its order denying timely petitions for rehearing *en banc* on July 10, 2001. A.120a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act ("FSIA" or "Act") is codified at sections 1330, 1332(a)(2) & (4), 1391(f), 1441(d), 1602-11 of title 28, United States Code. It provides, among other things, that "[a]ny civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed" to federal court. 28 U.S.C. § 1441(d). Section 1603(a) of title 28, United States Code defines "foreign state" to include

any "agency or instrumentality of a foreign state," which is in turn defined as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or *a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof*, and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1603(b) (italics added). The question presented involves the language in italics.

STATEMENT OF THE CASE

1. The Nature of the Case

The plaintiffs are citizens and residents of Costa Rica, Ecuador, Guatemala and Panama who claim to have worked on banana farms in those countries and, during the course of such employment, to have suffered personal injury from exposure to dibromochloropropane (DBCP), a pesticide formerly used on banana trees.

The plaintiffs filed this putative class action on October 3, 1997 in the Circuit Court of the First Circuit of the State of Hawaii seeking monetary damages and injunctive relief. The named defendants are alleged manufacturers of DBCP (such as Shell Oil and Dow Chemical) and alleged operators of the foreign banana farms (such as Dole, Chiquita and Del Monte).

Defendant Dole Food Company, Inc. impleaded the Dead Sea Companies, alleging that they manufactured and sold DBCP to one or more defendants. The Dead Sea Companies thereafter removed the action to the U.S. District Court for the District of Hawaii. The removal was based on 28 U.S.C. § 1441(d), which provides that any foreign state may remove claims asserted against it to federal court. The FSIA defines "foreign state" to include an "agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a), which is, in turn, defined in pertinent part as "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state. . . ." *Id.* § 1603(b)(2). The Dead Sea Companies contend that they are agencies or instrumentalities under the Act because at all relevant times the State of Israel owned a majority of their shares through a tiered ownership structure.

This is not the first case in which the Dead Sea Companies' status under the FSIA has been presented. It happened before in a series of lawsuits brought in Texas state courts against the same principal defendants as in this case by thousands of individuals who alleged that they too had labored on banana farms in Central America and other regions of the globe and had thereby suffered injuries from exposure to DBCP. In those cases, one or more of the defendants impleaded one or both of the Dead Sea Companies, which thereupon removed the cases to federal court. Ruling on plaintiffs' motion to remand several of those actions, which had been consolidated in the U.S. District Court for the Southern District of Texas, Judge Sim Lake upheld the Dead Sea Companies' claim to being agencies or instrumentalities of the State of Israel under this provision of the FSIA. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1315, 1318-19, 1340 n.33 (S.D. Tex. 1994); *Rodriguez v. Shell Oil Co.*, 932 F. Supp. 177, 180 n.6 (S.D. Tex. 1996). The U.S. Court of Appeals for the Fifth Circuit expressly affirmed Judge Lake's FSIA rulings in *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001).

In its ruling below, the court of appeals rejected the analysis and holding of *Delgado v. Shell Oil Co.* and held that the Dead Sea Companies are not agencies or instrumentalities under the FSIA. Thus, the Ninth and Fifth Circuits – ruling in functionally identical DBCP litigations – have reached the opposite conclusion as to whether the Dead Sea Companies are agencies or instrumentalities under the FSIA and, hence, whether there is federal jurisdiction over the lawsuits.

2. Statutory Background

Congress enacted the FSIA in 1976 to establish uniform "standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The entities to be accorded foreign sovereign status under the Act are broadly defined to include the foreign sovereign and its political subdivisions, agencies, and instrumentalities. 28 U.S.C. § 1603(b); *Ruggiero v. Compania Peruana De Vapores*, 639 F.2d 872, 878 (2d Cir. 1981).

The Act provides that all such foreign sovereign entities shall be immune from the jurisdiction of courts in the United States, subject to certain exceptions. 28 U.S.C. § 1604. In fact, the exceptions describe a fairly wide range of cases in which foreign states and their agencies and instrumentalities may be sued, as, for example, where the claims arise out of commercial activities conducted or having a direct effect in the United States. *Id.* § 1605(a)(2). Where such suits may be maintained, the Act accords certain protections to the foreign sovereign entities. Among other things, they are entitled to federal court jurisdiction and a non-jury trial. *Id.* §§ 1330(a), 1441(d).

The provision of a federal forum for such suits is designed to protect the "foreign relations of the United States," *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. at 493; to reduce the potential for conflicting results, *id.* at 497; and to "avoid any local bias . . . inherent in state court proceedings." *In re Delta America Re Ins. Co.*, 900 F.2d 890, 893 (6th Cir. 1990). Such suits may raise "foreign policy concerns" to the extent they require a court in this country to "judg[e] the acts of another nation" regarding allegations that it, or its agencies or instrumentalities, committed a tort, breached a contract, or otherwise committed a legal wrong. *GE Capital Corp. v. Grossman*, 991 F.2d 1376, 1381 (8th Cir. 1993). All of these concerns are implicated in a judicial interpretation of the reach of the Act's definition of "agency or instrumentality" of a foreign state.

3. Statement of Facts

It is undisputed that the Dead Sea Companies meet the requirements of subparts (1) and (3) of 28 U.S.C. § 1603(b): they are separate corporations organized under the laws of the State of Israel, and their principal place of business is Beer Sheva, Israel. The dispute presented to the district court and reviewed on appeal centered upon whether the Companies satisfy either of the disjunctive, alternative requirements of § 1603(b)(2). Thus, the lower courts were asked to determine whether during the relevant period the State of Israel had a majority ownership interest in the Companies *or* whether the Companies were organs of the State within the meaning of the FSIA. Since the majority ownership prong of § 1603(b)(2) is the issue presented here, the discussion below focuses on the facts pertinent to that issue.

The State of Israel created Dead Sea Bromine in 1955 to develop and market the State-owned mineral resources of the Dead Sea, a saline lake located between Israel and Jordan. These minerals, which include bromine, potassium and magnesium,

are among Israel's principal (among relatively few) natural resources. SER738.[1] Dead Sea Bromine's subsidiary, BCL, formulates the bromine extracted by its parent into bromine-based compounds that have a wide variety of industrial, commercial and agricultural uses. SER738-39. During the relevant time period, the Companies were subsidiaries of a corporation owned by the State of Israel, and, consequently, the Companies were, like their parent corporation, subject to Israel's Government Companies Law, which provided the State with authority to control and direct their affairs. SER744. The State exercised that authority on many occasions. SER855-1183.

The record establishes that the State of Israel held a substantial majority ownership interest in Dead Sea Bromine throughout the period 1968-95. (For purposes of the FSIA analysis, this time period is over-inclusive, in view of plaintiffs' allegation – in paragraph 24 of their Complaint – that they could not have been exposed to DBCP manufactured or distributed by the Companies prior to 1975. SER10.) For example, from 1968-75, the State held a 99% ownership interest in Dead Sea Bromine. During this period, the State owned 99% of the shares of Dead Sea Works Ltd. ("Dead Sea Works"), an Israeli corporation whose principal offices are in Beer Sheva, Israel. Dead Sea Works owned virtually all shares of Dead Sea Bromine (99.9% of its shares), except for a single share owned directly by the State. SER740, SER749-50, SER754.

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1. This Petition cites to the Supplemental Excerpts of Record that Petitioners filed with the court of appeals as "SER__." The record on the FSIA issue consists of declarations and exhibits that the Dead Sea Companies submitted to the district court in opposition to plaintiffs' motion to remand. Plaintiffs neither challenged the admissibility of the Companies' submissions nor presented any additional evidence pertinent to the FSIA issue. No party requested that the district court hold an evidentiary hearing and no hearing was held. The district court thus made its rulings on a paper record that the court of appeals reviewed below.

The State restructured its holdings in 1975 but retained a 98% ownership interest in Dead Sea Bromine. In that year, the State transferred most of its shares in Dead Sea Works to Israel Chemicals Ltd. ("ICL"), an Israeli corporation then owned entirely by the State of Israel. ICL thereafter owned approximately 98% of the shares of Dead Sea Works, which continued to own 99.9% of the shares of Dead Sea Bromine. The State continued to directly own the one other share of Dead Sea Bromine. SER740-41, SER750, SER752, SER754.

Although the percentages of its ownership interest fluctuated in the ensuing years,[2] the State of Israel continued to maintain its majority ownership interest in Dead Sea Bromine, through its ownership of virtually all the shares of ICL and ICL's ownership of varying majority interests of Dead Sea Works, until 1995, when the State's interest in ICL, and hence, its subsidiaries, fell below 50%.

The State also held a majority ownership interest in BCL (Dead Sea Bromine's subsidiary). The facts pertinent to BCL are similar in character to those for Dead Sea Bromine, *see* SER740, SER754-55, SER760-62, but they need not be recited because the question presented may be addressed by analyzing Dead Sea Bromine's status alone. If it is an agency or instrumentality under the Act, the court below erred in dismissing the action for lack of subject matter jurisdiction.

4. Proceedings in the District Court

After plaintiffs filed this action in state court in Hawaii, defendant Dole Food Company, Inc. filed a third-party complaint against the Dead Sea Companies, and they removed the action under the FSIA. *See* 28 U.S.C. § 1441(d). The defendants

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2. Further details concerning the State's ownership position in Dead Sea Bromine are set forth in the record at SER740-41, SER750, SER752, SER754.

thereafter filed a Supplemental Notice of Removal based upon the foreign relations concerns raised by the complaint. Plaintiffs moved to remand the action for lack of subject matter jurisdiction in the federal court. The defendants moved to dismiss for *forum non conveniens*.

The issue in controversy before the district court on the Dead Sea Companies' removal was whether the Companies were "an organ of a foreign state or political subdivision thereof" or an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id.* § 1603(b)(2). The Dead Sea Companies claimed that they met both requirements, either one of which would be sufficient to satisfy § 1603(b)(2).

On September 9, 1998, the district court held that the Dead Sea Companies were not agencies or instrumentalities of Israel. A.55a. The court agreed with the Companies' position – which every other court that has reached the issue has also endorsed[3] – that an entity is covered by the FSIA if it was an agency or instrumentality of a foreign state during the time of the alleged conduct that gave rise to the claims for relief asserted against it. A.62a-64a. Nevertheless, the court held that during this relevant time period, the Dead Sea Companies were neither majority owned nor an organ of the State of Israel. As to the "majority . . . ownership interest" prong of § 1603(b)(2), the court found that, although the State of Israel held an indirect

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3. *See Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480-81 (5th Cir. 1998); *GE Capital Corp. v. Grossman*, 991 F.2d 1376, 1380-82 (8th Cir. 1993); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 449-50 (6th Cir. 1988); *In re Chase & Sanborn Corp.*, 835 F.2d 1341, 1347 (11th Cir. 1988), *rev'd on other grounds sub nom. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Belgrade v. Sidex International Furniture Corp.*, 2 F. Supp.2d 407, 412-14 (S.D.N.Y. 1998); *Delgado v. Shell Oil Co.*, 890 F. Supp. at 1340 n.33, *aff'd*, 231 F.3d 165 (5th Cir. 2000); *Papanos v. Lufthansa German Airlines*, No. 94-2667-CIV, slip op. at 7 (S.D.Fla. 1995).

majority ownership interest in the Companies, such an interest was insufficient under the Act. A.71a. As to the "organ" prong of § 1603(b)(2), the court held that neither of the Dead Sea Companies was an organ because they were "not controlled entirely by government appointees, do not employ only public servants, . . . [and] are not entirely owned by the State of Israel." A.76a.

In the same decision, the district court held that it had federal question jurisdiction because of foreign relations concerns and held that it would conditionally dismiss the action under the doctrine of *forum non conveniens*. A.83a.

On November 17, 1998, the district court denied reconsideration of its opinion. A.49a. On March 8, 1999, the district court dismissed the action for *forum non conveniens*. A.34a. On June 16, 1999, the court denied plaintiffs' motion for reconsideration. A.27a . Plaintiffs' notice of appeal and the Dead Sea Companies' notice of cross-appeal followed.

5. Proceedings in the Court of Appeals

In their appeal, plaintiffs argued that the district court did not have subject matter jurisdiction and, in any event, should not have dismissed the action for *forum non conveniens*. In their cross-appeal, the Dead Sea Companies argued that the district court erred in holding that they were not agencies or instrumentalities under the Act.

The court of appeals heard argument on August 9, 2000 and rendered its decision on May 30, 2001. The court held that the district court had neither federal-question nor FSIA jurisdiction and ordered that the action be remanded to state court, without reaching the *forum non conveniens* issue.

The Ninth Circuit's ruling on the FSIA issue rested principally on its prior decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995) ("*Gates*"). In *Gates*, the Ninth Circuit had rejected the contention that any corporation owned by an "organ" of a foreign state was itself an "agency or instrumentality" under the FSIA. The Dead Sea Companies argued that their corporate structure was materially different than the one reviewed in *Gates* because the Companies' ultimate parent entity – unlike the "organ" in *Gates* – was owned by a foreign state and, thus, a foreign state owned "a majority of [their] shares or other ownership interest." (By contrast, in *Gates*, the foreign state had no ownership interest in the parent "organ" that owned the subsidiary claiming FSIA status.) In its ruling below, however, the court of appeals rejected the Companies' argument and read *Gates* "as limiting an instrumentality to the first tier of ownership: those entities owned directly by the foreign state itself. . . . [*Gates*] held that a corporation wholly owned by an instrumentality of a foreign government is not a foreign instrumentality under the Act." A.22a.

Although it placed principal reliance on and felt bound by its decision in *Gates*, the court of appeals did address the Companies' contention that the phrase "other ownership interest" in § 1603(b)(2) is sufficiently broad to encompass the majority ownership interest that the State of Israel held in the Companies. A.22a-23a. The court rejected the Companies' argument on the ground that construing "other ownership interest" in that way would, in its view, render the reference to "shares" in § 1603(b)(2) superfluous. A.23a.

The court of appeals forthrightly acknowledged that its interpretation of the FSIA conflicted with that of other circuit courts:

> The [Dead Sea] Companies point out that several other circuits have disagreed with *Gates* and

> held that subsidiaries of a corporation owned by a foreign state are in fact instrumentalities under the FSIA. *See, e.g., Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001); *In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932, 941 (7th Cir. 1996); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 448-50 (6th Cir. 1988). They argue, not implausibly, that federal courts should not care how a foreign government structures its ownership interests so long as it, in fact, owns a majority interest in a particular corporation. But none of this matters, because *Gates* decided this question, and we are bound by its authority.

A.23a-24a (citation to *Gould* modified to full citation). The court of appeals thus alluded to the strength of the Companies' arguments, and to the authority upon which they rested, but held that *Gates* precluded it from considering the issue anew.

REASONS FOR GRANTING THE WRIT

1. The Question Presented Is Important and Arises Frequently.

The question presented – whether a subsidiary of a company owned by a foreign state may itself claim to be an agency or instrumentality of the foreign state under the FSIA, and, hence, whether the federal courts have jurisdiction over a lawsuit brought against such an entity – is one that has arisen repeatedly and no doubt will continue to be the source of much litigation and dispute until the law is settled by this Court. Until that time, the uniformity of law pertaining to suits against foreign sovereigns and related entities that the FSIA was designed to achieve will not exist. Like the Dead Sea Companies in this case, many enterprises owned and controlled by foreign states,

engaged in a broad range of commercial activities in and affecting the United States, will – or will not – be entitled to the protections of the FSIA depending on the particular circuit in which claims are asserted against them.

Numerous courts have confronted and rejected the argument that tiering is not acceptable under the Act, holding that a subsidiary of an entity owned by a foreign state is entitled to "agency or instrumentality" status because such an ownership structure meets the "majority ownership" requirement of 28 U.S.C. § 1603(b)(2):

- *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000) (holding Dead Sea Companies agencies or instrumentalities of the State of Israel because "indirect or tiered majority ownership is sufficient to qualify an entity as a foreign state");

- *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932, 935-41 (7th Cir. 1996) (holding a French aircraft manufacturing corporation to be an "agency or instrumentality" where the French and Italian governments held a majority ownership interest in the corporation through tiered subsidiaries) ("*Air Crash*");

- *Lehman Brothers Commercial Corp. v. Minmetals International Non-Ferrous Metals Trading Co.*, 2001 WL 423031, *2-4 (S.D.N.Y. April 25, 2001) (holding that FSIA applied to a metals trading company that is a subsidiary of a trading conglomerate that is a subsidiary of a holding corporation owned by the People's Republic of China);

- *Parex Bank v. Russian Savings Bank*, 81 F. Supp.2d 506, 508 (S.D.N.Y. 2000) (holding that FSIA applied to a Russian bank over 60% of whose shares were

owned by the Russian Central Bank, which is owned by the Russian Government);

- *In Re Clearsky Shipping Corp.*, 1999 WL 1021825 (E.D.La. Nov. 8, 1999) (holding that FSIA applied to a telecommunications company a majority of whose shares were owned by corporations owned by the Cuban government);

- *Alejandre v. AT&T*, 42 F. Supp.2d 1317, 1336 (S.D. Fla.) (holding that FSIA applied to a telecommunications company a majority of whose shares were owned by corporations owned by the Cuban government), *rev'd on other grounds*, 183 F.3d 1277 (11th Cir. 1999);

- *Millicom International Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. 14, 18 n.5 (D.D.C. 1998) (holding that a telecommunications and data transmission service provider was an "agency or instrumentality" of Costa Rica because it was a subsidiary of the State-owned telecommunications monopoly);

- *Talbot v. Saipam A.G.*, 835 F. Supp. 352, 353 n.2 (S.D. Tex. 1993) (holding that a vessel-owning corporation was an "agency or instrumentality" of Italy where the Italian government owned most of the shares in two corporations that collectively owned 81.05% of the vessel-owning corporation's shares);

- *Trump Taj Mahal Associates v. Costruzioni Aeronautiche Giovanni Agusta S.P.A.*, 761 F. Supp. 1143, 1149 (D.N.J. 1991) (holding that a helicopter manufacturing corporation was an "agency or instrumentality" where the Italian government owned

shares in a holding company that owned shares of another holding company that owned 98.9% of the shares of the helicopter manufacturing corporation), *aff'd*, 958 F.2d 365 (3d Cir.), *cert. denied*, 506 U.S. 826 (1992);

- *Rutkowski v. Occidental Chemical Corp.*, 1988 WL 107342 (N.D. Ill. 1988) (holding that a tiered subsidiary of the province of Quebec was an "agency or instrumentality" because of the Act's focus on substance rather than corporate form);

- *Outbound Maritime Corp. v. P.T. Indonesian Consortium*, 582 F. Supp. 1136, 1143-45 (D.Md. 1984) (holding a joint venture, a majority of which was owned by a corporation wholly owned by Indonesia, was an "agency or instrumentality"); and

- *O'Connell Machinery Co., Inc. v. M.V. "Americana"*, 566 F. Supp. 1381 (S.D.N.Y. 1983) (holding that a shipping entity was an "agency or instrumentality" of the Italian government where a holding company owned by the government, through a subsidiary or subdivision, owned a majority of its shares), *aff'd*, 734 F.2d 115 (2d Cir.), *cert. denied*, 469 U.S. 1086 (1984).

The Ninth Circuit's decision conflicts with the holding of each of the foregoing cases. It is also in conflict with the decisions of numerous other courts that have been presented with similar fact patterns and stated, or assumed without extended discussion, that a subsidiary corporation is an "agency or instrumentality" under the FSIA. These cases all accepted tiered subsidiaries as agencies or instrumentalities under the Act and illustrate further the frequency with which the "subsidiary" issue arises:

- *Reiss v. Societe Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 746 (2d Cir. 2000) ("agency or instrumentality" status given to second tier subsidiary of Republic of France);

- *Brown v. Valmet-Appleton*, 77 F.3d 860, 862-63 (5th Cir. 1996) ("agency or instrumentality" status given to a paper machinery corporation that was wholly owned by a corporation that was 70% owned by the Republic of Finland);

- *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 107, 109 (6th Cir. 1995) ("agency or instrumentality" status given to subsidiary of a corporation owned by Canadian government);

- *Lopez del Valle v. Gobierno de la Capital*, 855 F. Supp. 34, 35-36 (D.P.R. 1994) ("agency or instrumentality" status given to entity indirectly owned by Venezuelan government through a holding company);

- *Allendale Mut. Ins. Co. v. Bull Data Syst., Inc.*, 10 F.3d 425, 426-27 (7th Cir. 1993) ("agency or instrumentality" status given to two corporations owned by an entity 90% of which was owned by the Republic of France);

- *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 317 (4th Cir. 1988) ("agency or instrumentality" status given to four corporations owned by a company that was in turn owned by the Republic of France);

- *Gould Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 448-50 (6th Cir. 1988) ("agency or instrumentality" status given to subsidiary of a French corporation, majority owned by the Republic of France); and

- *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 (D.C. Cir. 1982), *on remand*, 606 F. Supp. 38 (D.D.C. 1984), *aff'd*, 787 F.2d 655 (D.C. Cir. 1986) ("agency or instrumentality" status given to subsidiary of corporation owned by Republic of Ireland).[4]

Finally, following the Ninth Circuit's decision in *Gates*, several district courts confronted with a subsidiary of an entity owned by a foreign state have held, like the Ninth Circuit below, that a tiered ownership structure does not satisfy the Act's definition of "agency or instrumentality." *See Dewhurst v. Telenor Invest AS*, 83 F. Supp.2d 577 (D.Md. 2000); *USF&G Co. v. Braspetro Oil Services Co.*, 1999 WL 307666 (S.D.N.Y. 1999); *Southern Ocean Seafood Co. v. Holt Cargo Systems, Inc.*, 1997 U.S. Dist. Lexis 12159 (E.D. Pa. 1997); *Hyatt Corp. v. Stanton*, 945 F. Supp. 675 (S.D.N.Y. 1996); *Gardiner Stone Hunter Int. v. Iberia Lineas Aereas de Espana, S.A.*, 896 F. Supp. 125, 130 (S.D.N.Y. 1995).

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4. One could add to this list Ninth Circuit cases in which that circuit court accepted tiered subsidiaries as agencies or instrumentalities under the Act. Although these cases no longer state the law in the Ninth Circuit, they further illustrate the frequency with which the tiering issue has arisen. *See Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1081 (9th Cir. 2001) ("agency or instrumentality" status assumed for airplane manufacturing corporation owned by four aerospace corporations owned by the Republic of Italy); *Theo H. Davies & Co. v. Republic of the Marshall Islands*, 174 F.3d 969, 971-73 (9th Cir. 1999) ("agency or instrumentality" status given to second tier subsidiary of the Republic of Marshall Islands); *Straub v. A.P. Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994) ("agency or instrumentality" status given to second tier subsidiary of the province of Quebec); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404, 1406-7, 1411-12 (9th Cir. 1989) ("agency or instrumentality" status given to subsidiary of a corporation 81% of whose shares were owned by Republic of Finland); *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 795 n.2, 796-800 (9th Cir. 1989) ("agency or instrumentality" status given to wholly owned subsidiary of Aer Lingus, a corporation owned by the Republic of Ireland).

Not only does the "subsidiary" issue arise frequently, it is important since the FSIA is one of the basic statutes granting the federal courts subject matter jurisdiction over civil actions. *See Ruggiero v. Compania Peruana De Vapores*, 639 F.2d at 875-78. The issue is often critical, since, as in the instant case, it may determine whether the action should be resolved in federal or state court. Continued litigation in the lower courts will not move the issue to final resolution. Moreover, the confusion that currently exists in the case law jeopardizes the important foreign policy and foreign relations concerns that gave rise to the FSIA. *See supra* at 4-5. At present, numerous significant enterprises closely connected to foreign sovereign states confront a major uncertainty as to whether they enjoy the protections of the Act for claims asserted against them in the United States. Since the issue arises frequently and is important, it is worthy of this Court's review.

2. The Ninth Circuit's Holding Creates a Direct Conflict With Decisions Of The Fifth and Seventh Circuits and Numerous Other Courts That Have Addressed The Same Question.

The decision below directly conflicts with the Fifth Circuit's decision that the Dead Sea Companies are agencies or instrumentalities of the State of Israel under the FSIA. *See Delgado v. Shell Oil Co.*, *supra*. The court of appeals acknowledged the conflict in its opinion. A.23. The issue in *Delgado*, like that in this case, focused on the language of § 1603(b)(2). The Fifth Circuit, noting Israel's undisputed majority ownership of the Dead Sea Companies through its direct ownership of their ultimate parent corporation, held that the Companies were "agencies or instrumentalities" under the Act, on the ground that:

> The plain language of the statute simply requires "ownership" by a foreign state. It draws no

> distinction between direct and indirect ownership; neither does it expressly impose a requirement of direct ownership.

231 F.3d at 176. By contrast, the court of appeals below squarely held that § 1603(b)(2) "does not include the indirect ownership of shares. . . ." A.23a. That two Circuits interpreting the identical statutory provision in functionally identical lawsuits have reached opposite conclusions whether the protections of the FSIA apply to the Dead Sea Companies creates a clean legal issue ideally suited for this Court's review, since the facts relating to the State's majority ownership of the Companies through a tiered subsidiary structure are undisputed and, in any event, established by the record.

The Ninth Circuit's interpretation of the FSIA also conflicts with the Seventh Circuit's holding and extensive analysis of the subsidiary issue in *Air Crash*, which the court of appeals also acknowledged in its opinion below. A.23a. Although the end result of the holding in *Air Crash* is the same as in *Delgado*, the statutory exegesis took a different route. In *Air Crash*, the Seventh Circuit focused on the interrelationship between § 1603(a) (defining "foreign state" as including an "agency or instrumentality") and § 1603(b) (defining "agency or instrumentality"), and concluded that the two sections should be interpreted recursively. *See* 96 F.3d at 941. This "recursive" interpretation provides an analytically distinct rationale for the conclusion that both of the Dead Sea Companies are "agencies or instrumentalities."

The *Air Crash* analysis starts with the first-tier of ownership and proceeds from there. To illustrate, consider ICL (Dead Sea Bromine's grandparent), which, under any interpretation of the Act, would be an "agency or instrumentality" under § 1603(b) because the State directly owned 100% of its shares. Under the reasoning of *Air Crash*, ICL is, therefore, a "foreign state"

pursuant to § 1603(a), since a "foreign state" is defined as including any "agency or instrumentality." Dead Sea Works (Dead Sea Bromine's parent, whose shares were owned by ICL), by virtue of being directly owned by ICL (a "foreign state" under § 1603(a)) would also be an "agency or instrumentality" pursuant to § 1603(b) and, therefore, a "foreign state" pursuant to § 1603(a). For the same reason, Dead Sea Bromine and BCL would also be directly owned by a "foreign state" and be an "agency or instrumentality" under the Act. *See Air Crash*, 96 F.3d at 939-41; *Millicom International Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. at 18.

The Ninth Circuit is the only circuit court of appeals to have rejected tiered ownership under § 1603(b)(2). Although the Fifth and Seventh Circuits are the only other circuit courts to have analyzed the issue at any length, the Ninth Circuit's interpretation is also in conflict with the many other decisions cited *supra* at 12-16, including those of the D.C., Second, Fourth and Sixth Circuits in *Gilson*, *Reiss*, *J.J. Ryan & Sons, Inc.*, and *Gould Inc.*, respectively, all of which endorsed or accepted majority-owned subsidiary entities as falling within the purview of the Act.

Thus, this Court's answer to the question of how subsidiary corporations should be treated under the Act would resolve a stark conflict among the circuits, and numerous lower courts, concerning a pivotal and frequently presented jurisdictional issue. The issue has been addressed as well by numerous law review commentators, who are also at odds as to the status of subsidiaries under the Act.[5] A quarter of a century after the FSIA's

5. *See* Comment: *Litigating Claims Over Foreign Government-Owned Corporations under the Commercial Activities Exception to the Foreign Sovereign Immunities Act*, 20 J. INTL. L. BUS. 181 (Fall 1999); Jane H. Griggs, *The Foreign Sovereign Immunities Act: Do Tiered Corporate Subsidiaries Constitute Foreign States?*, 20 W. NEW ENG. L. REV. 387 (1998); Thad T. Dameris & Michael J. Mucchetti, *Vectors to*

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enactment in 1976, the subsidiary issue has been fully analyzed by the lower courts and legal scholars and is now ripe for review by this Court.

3. The Ninth Circuit's Holding Is Incorrect.

Quite apart from being inconsistent with the case law of other circuits, the court of appeals decision below is not consistent with the language, structure or history of the Act. Its erroneous decision should be vacated and reversed.

Although the district court's undisputed finding below was that the State of Israel had "*indirect ownership* of [the] Dead Sea [Companies]" through its direct ownership of their parent corporation, A.65a (emphasis added), the court of appeals (like the district court) held that such an ownership interest does not meet the requirements of the Act. Yet the plain language of § 1603(b)(2) ("a majority of whose shares or other ownership interest is owned by a foreign state") makes no reference to any requirement that the "ownership interest" be "direct." That section requires only that the foreign state have a "majority . . . ownership interest" in the entity. The word "interest" is the "most general term that can be employed to denote a right, claim, title, or legal share in something." *Black's Law Dictionary* at 729 (5th Ed. 1979). "More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, but less than title." *Id.* Thus, the fact that the State of

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Federal Court: Unique Approaches to Subject Matter Jurisdiction in Aviation Cases, 62 J. Air L. & Com. 959 (1997); Joseph W. Hardy, Jr., *Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act*, 31 Ga. L. Rev. 1121 (1997); Kelly Shaw, *Tiered Entities and Sovereign Privileges Under the Foreign Sovereign Immunities Act*, 34 San Diego L. Rev. 1817 (Fall 1997); John Fellas, *Tiering of Ownership Interests Under the FSIA*, N.Y.L.J., Apr. 8, 1997, at 1; *see also The U.S. Foreign Sovereign Immunities Act*, 648 PLI/Lit 191 (Feb. 2001); National Law Journal, Feb. 3, 1997, at B7.

Israel did not have title to the shares of the Dead Sea Companies is irrelevant: the State held a majority ownership "interest" in the companies by owning their parent company. This ownership gave the State the right to receive the profits generated by the Dead Sea Companies; to approve their capital structure or any decision to privatize them; to appoint their management; to approve the appointment of their directors, legal advisors and accountants; to approve their budgets and business plans; and to control their affairs in numerous other respects. SER855-1183. Clearly, the State held a controlling, majority ownership "interest" in the Companies. *See Trump Taj Mahal Associates v. Costruzioni Aeronautiche Giovanni Agusta S.p.A.*, 761 F. Supp. at 1150 (foreign state has a majority "ownership interest" in a subsidiary of a state-owned corporation).

The Act's legislative history is in accord with the interpretation urged here by the Companies. The key House Report (H.R. Rep. No. 94-1487, 94th Cong., 2nd Sess., *reprinted in* 5 U.S.C.C.A.N. 6604 (1976)) makes plain that Congress intended to cast the agency or instrumentality net broadly. *See Ruggiero v. Compania Peruana De Vapores*, 639 F.2d at 873-75. The Act was crafted to cover a myriad of governmental, social and economic systems. The Report notes the widely varying types of enterprises that Congress had in mind (including trading enterprises, shipping lines, airlines, steel companies, and mining enterprises) and reflects its understanding that these entities would be engaged in commercial activities for profit. H.R. Rep. No. 94-1487 at 16. If one thing is clear from the numerous cases cited above, it is that sovereign states commonly employ a tiered corporate structure to engage in and manage such enterprises. It would fundamentally undermine Congressional intent to narrow the application of the FSIA by reading into it the restrictive interpretation adopted by the Ninth Circuit.

The Congressional policy concerns underlying the FSIA are in no way diminished by the fact that the foreign sovereign has chosen to hold and control its entities through a tiered corporate ownership structure. As one court has observed, the "FSIA specifically provides that 'corporate form' – in and of itself – be immaterial." *O'Connell Machinery Co., Inc. v. M.V. "Americana"*, 566 F. Supp. 1381, 1385 (S.D.N.Y. 1983), *aff'd*, 734 F.2d 115, 116 (2d Cir. 1984). The foreign sovereign's internal, administrative decision as to how its ownership interest is held or structured under its form of government and its legal and economic systems is immaterial to the purposes and objectives of the statute.

The Ninth Circuit did not articulate any policy rationale as to why a company that is 100% owned by a foreign state should be entitled to remove a case to federal court but a wholly owned subsidiary of that company should not be so entitled. The plain language of the FSIA makes both companies an "agency or instrumentality" of the foreign state if the state holds a majority ownership interest in the companies. Indeed, under the Ninth Circuit's approach, a company that is 51% owned by a foreign state would be entitled to the Act's protections, but a second tier subsidiary in which the state had a 100% interest would not. Because there is "no policy reason why tiering through an intermediary majority owned by a foreign state should not be permitted under the FSIA," *Linton v. Airbus Industrie*, 934 S.W.2d 754, 762 (Ct. Appeals Houston [14th Dist.] 1996), there is no reason to depart from the plain language of the statute, which requires only that a foreign state have a majority "ownership interest" for the FSIA to apply.

Although the Ninth Circuit below relied principally on a broad interpretation of its prior decision in *Gates*, it also opined that the Dead Sea Companies' interpretation of "other ownership interest" was not persuasive because it would swallow and make superfluous the reference in § 1603(b)(2) to "shares." A.23a. The Ninth Circuit's argument is not logical. The word "other,"

in this context, means "different." *Webster's Ninth New Collegiate Dictionary* at 835 (illustrating this meaning with the sentence "any other color would have been better"). A plain language interpretation of "other ownership interest" does not render the reference to "shares" superfluous because shares are not included in that which is referred to by "*other* ownership interest."

Finally, apart from all of these arguments, the Seventh Circuit's "recursive" interpretation of the Act in *Air Crash*, *see supra* at 18-19, provides an entirely different rationale for rejecting the Ninth Circuit's interpretation. The Seventh Circuit's interpretation of the Act is consistent with, and indeed compelled by, the plain language of § 1603, and should be endorsed by this Court.

CONCLUSION

The petition should be granted so that the Court may answer the question presented. The issue arises frequently. It has given rise to conflicting holdings by several of the circuit courts and by numerous district courts. It has been analyzed by the law reviews. It involves the subject matter jurisdiction of the federal courts under the Foreign Sovereign Immunities Act of 1976 and is therefore important. It is squarely presented in this case and is worthy of this Court's review.

Dated: New York, New York
October 5, 2001

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MAY 30, 2001

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 99-16524
D.C. No. CV-97-01516-HG/BMK

GERARDO DENNIS PATRICKSON; RODOLFO BERMUDEZ ARIAS; BENIGNO TORRES HERNANDEZ; FERNANDO JIMENEZ ARIAS; SANTOS LEANDROS; HERMAN ROMERO AGUILAR; ELIAS ESPINOZA MERELO HOOKER ERA CELESTINO; ALIRIO MANUEL MENDEZ; CARLOS HUMBERTO RIVERA, individually and on behalf of others similarly situated,

Plaintiffs-Appellants,

v.

DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY; DOLE FRESH FRUIT INTERNATIONAL, LIMITED; PINEAPPLE GROWERS ASSOCIATION OF HAWAII; AMVAC CHEMICAL CORPORATION; SHELL OIL COMPANY; DOW CHEMICAL COMPANY; OCCIDENTAL CHEMICAL CORPORATION, individually and as successor to Occidental Chemical Company and Occidental Chemical Agricultural Products, Inc., Hooker Chemical and Plastics, Occidental Chemical Company of Texas and Best Fertilizer Company; STANDARD FRUIT CO.; STANDARD FRUIT & STEAMSHIP CO.; STANDARD FRUIT COMPANY DE COSTA RICA, S.A.; STANDARD FRUIT COMPANY DE HONDURAS, S.A.; CHIQUITA BRANDS, INC.; CHIQUITA BRANDS INTERNATIONAL, INC., individually; UNITED BRANDS COMPANY, INC., suc Chiquita Brands International,

INC.; MARITROP TRADING CORPORATION; DEL MONTE FRESH PRODUCE, N.A.; DEL MONTE FRESH PRODUCE HAWAII, INC.; DEL MONTE FRESH PRODUCE COMPANY AND FRESH DEL MONTE N.V.,

Defendants-Appellees,

v.

DEAD SEA BROMINE CO., LTD.; BROMINE COMPOUNDS LIMITED,

Third-party-defendants-Appellees.

No. 99-16770
D.C. No. CV-97-01516-HG/BMK

GERARDO DENNIS PATRICKSON; RODOLFO BERMUDEZ ARIAS; BENIGNO TORRES HERNANDEZ; FERNANDO JIMENEZ ARIAS; SANTOS LEANDROS; HERMAN ROMERO AGUILAR; ELIAS ESPINOZA MERELO HOOKER ERA CELESTINO; ALIRIO MANUEL MENDEZ; CARLOS HUMBERTO RIVERA, individually and on behalf of others similarly situated,

Plaintiffs-Appellees,

v.

DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY; DOLE FRESH FRUIT INTERNATIONAL, LIMITED; PINEAPPLE GROWERS ASSOCIATION OF HAWAII; AMVAC CHEMICAL CORPORATION; SHELL OIL COMPANY; DOW CHEMICAL COMPANY; OCCIDENTAL CHEMICAL CORPORATION, individually and as successor to Occidental Chemical Company and Occidental Chemical Agricultural

Appendix A

Products, Inc., Hooker Chemical and Plastics, Occidental Chemical Company of Texas and Best Fertilizer Company; STANDARD FRUIT CO.; STANDARD FRUIT & STEAMSHIP CO.; STANDARD FRUIT COMPANY DE COSTA RICA, S.A.; STANDARD FRUIT COMPANY DE HONDURAS, S.A.; CHIQUITA BRANDS, INC.; CHIQUITA BRANDS INTERNATIONAL, INC., individually; UNITED BRANDS COMPANY, INC., suc Chiquita Brands International, Inc.; MARITROP TRADING CORPORATION; DEL MONTE FRESH PRODUCE, N.A.; DEL MONTE FRESH PRODUCE HAWAII, INC.; DEL MONTE FRESH PRODUCE COMPANY AND FRESH DEL MONTE N.V.,

Defendants-Appellees,

and

DEAD SEA BROMINE CO., LTD.; BROMINE COMPOUNDS LIMITED,

Third-party-defendants-Appellants.

Appeals from the United States District Court
for the District of Hawaii
Helen Gillmor, District Judge, Presiding

Argued and Submitted
August 9, 2000 — Pasadena, California

Filed May 30, 2001

Before: Alex Kozinski, Susan P. Graber and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Kozinski

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Appendix A

OPINION

KOZINSKI, Circuit Judge:

We consider whether the federal courts have jurisdiction over a class action brought by Latin American banana workers against multinational fruit and chemical companies alleged to have exposed the workers to a toxic pesticide.

I

Dibromochloropropane (DBCP) is a powerful pesticide. Tough on pests, it's no friend to humans either. Absorbed by the skin or inhaled, it's alleged to cause sterility, testicular atrophy, miscarriages, liver damage, cancer and other ailments that you wouldn't wish on anyone. Originally manufactured by Dow Chemical and Shell Oil, the pesticide was banned from general use in the United States by the Environmental Protection Agency in 1979. But the chemical companies continued to distribute it to fruit companies in developing nations.

In our case, banana workers from Costa Rica, Ecuador, Guatemala and Panama brought a class action against Dole Food Company, other major fruit companies and chemical companies (hereinafter "Dole") for injuries allegedly sustained from exposure to DBCP in their home countries. This case represents one front in a broad litigation war between these plaintiffs' lawyers and these defendants. In some of the cases, plaintiffs have reportedly won multimillion dollar settlements. *See* Larry K. Lowry & Arthur L. Frank, *Exporting DBCP and Other Banned Pesticides: Consideration*

of Ethical Issues, 5 Int'l J. Occup. Envtl. Health 135, 140 (1999). In others, defendants have managed to have the cases dismissed for forum non conveniens. *See, e.g., Delgado v. Shell Oil Co.*, 231 F.3d 165, 169 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1216 (11th Cir. 1985).

The merits are not before us. Instead, we must decide whether the case is properly in federal court. The workers brought suit in Hawaii state court. Dole responded by impleading two Israeli chemical companies, Dead Sea Bromine Company and Bromine Compounds Limited ("Dead Sea Companies"), which are alleged to have manufactured some of the DBCP used in plaintiffs' home countries. The Companies were, until recently, indirectly owned by the Israeli government, and they immediately removed the case to federal court pursuant to the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1330. Dole likewise removed based on federal-question jurisdiction, 28 U.S.C. § 1331. The district court denied plaintiffs' remand motion and then dismissed the case for forum non conveniens.

II

Dole was entitled to remove the case to federal court if plaintiffs could have brought it there to begin with. *See* 28 U.S.C. § 1441(a). We must therefore consider whether plaintiffs could have brought the case in district court under federal-question jurisdiction or the FSIA.[1]

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1. Because Dole Food Company is a citizen of the forum state, defendants could not remove based on diversity of citizenship. *See* 28 U.S.C. § 1441(b).

Appendix A

A. *Federal-Question Jurisdiction*

We are courts of limited jurisdiction. This means we hear only those cases that Congress directs and the Constitution permits us to hear. Under Article III, federal courts may assert jurisdiction over federal questions, extending to all cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2. Although any federal ingredient may be sufficient to satisfy Article III, the statutory grant of jurisdiction under 28 U.S.C. § 1331 requires more. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 495 (1983) ("Article III 'arising under' jurisdiction is broader than federal-question jurisdiction under § 1331 . . . .").

Even if the case turns entirely on the validity of a federal defense, federal courts may not assert jurisdiction unless a federal right or immunity is "an element, and an essential one, of the plaintiff's cause of action." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 11 (1983) (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936)). This venerable "well-pleaded complaint" rule keeps us from becoming entangled in state law controversies on the conjecture that federal law may come into play at some point during the litigation; it also ensures that Congress retains control over the size of federal court dockets.

Under conventional principles, the class action here unquestionably arises under state law. Plaintiffs seek relief under the common law of Hawaii for negligence, conspiracy, strict liability, intentional torts and breach of implied warranty. None of the claims has an element premised on a

right created by Congress or the Constitution. Dole nonetheless argues that we have federal-question jurisdiction because the case calls for an application of the federal common law of foreign relations.

Although there is no general federal common law, "there are enclaves of federal judge-made law which bind the States." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964). In *Sabbatino*, the Court held that one of those enclaves concerns the legal principles governing the nation's relationship with other members of the international community. The case considered whether the "act of state doctrine" requires U.S. courts to recognize the validity of the Cuban government's expropriation of private property. A long-standing common law principle, the act of state doctrine precludes courts from questioning the legality of actions that a foreign government has taken within its own borders. *See Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). *Sabbatino* considered whether the doctrine was a matter of state or federal law.

Because the Constitution gives the federal government exclusive authority to manage the nation's foreign affairs, the Court concluded that "rules of international law should not be left to divergent and perhaps parochial state interpretations." *Sabbatino*, 376 U.S. at 425. Whether a foreign state's act is given legal force in the courts of the United States is a "uniquely federal" question directly implicating our nation's foreign affairs. *See id.* at 425-26. Therefore, it was appropriate to fashion a single federal standard to govern such cases, rather than rely on a patchwork of separate state standards. Equally important, the Supreme

Court in *Sabbatino* reserved to itself ultimate review of all cases raising the act of state doctrine, rather than leaving them to the various state supreme courts. *See Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965) (Friendly, J.) (*Sabbatino* held that "all questions relating to an act of state are questions of federal law, to be determined ultimately, if need be, by the Supreme Court of the United States.").

Federal-question jurisdiction was not an issue in *Sabbatino*; the district court already had jurisdiction because of diversity of citizenship. The question presented was what substantive law would apply — state law pursuant to *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), or federal law. *Sabbatino* held that the common law of foreign relations falls outside *Erie*'s general rule and so federal law applies. *See Sabbatino*, 376 U.S. at 425. Federal common law is, of course, federal law; so if a plaintiff's claim arises under the federal common law recognized by *Sabbatino*, the federal courts will have jurisdiction under 28 U.S.C. § 1331.[2]

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2. Although the act of state doctrine generally serves as a defense, it can also be used affirmatively as the basis of a claim. *See* Restatement (Third) of Foreign Relations Law § 443 cmt. i (1986) (noting that an act of state may be "necessary to a litigant's claim or defense"); *see also Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986) ("We hold that federal jurisdiction is present in any event because the claim raises, as a necessary element, the question whether to honor the request of a foreign government that the American courts enforce the foreign government's directives to freeze property in the United States subject to future process in the foreign state."); *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 854 (2d Cir. 1962) (plaintiff must establish title as an element of his conversion claim, and title rests on the Cuban expropriation decree), *rev'd on other grounds*, *Sabbatino*, 376 U.S. 398.

See Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) ("§ 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.").

This is as far as *Sabbatino* goes, and it's not far enough, because nothing in plaintiffs' complaint turns on the validity or invalidity of any act of a foreign state. Plaintiffs seek compensation for injuries sustained from the defendants' manufacture, sale and use of DBCP. Plaintiffs don't claim that any foreign government participated in such activities or that the defendants acted under the color of foreign law. The case — at least as framed by plaintiffs — does not require us to evaluate any act of state or apply any principle of international law. The common law of foreign relations will become an issue only when — and if — it is raised as a defense.

Dole nonetheless argues that we must assert federal-question jurisdiction because the case concerns a vital sector of the economies of foreign countries and so has implications for our nation's relations with those countries. Plaintiffs represent a class of perhaps thousands of foreign nationals who allege that large multinational corporations harmed them in their home countries.[3] Dole argues that, by granting relief, American courts would damage the banana industry — one of the most important sectors of those countries' economies — and cast doubt on the balance those governments have struck between agricultural development and labor safety.

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3. As the district court recognized, such claims may raise serious questions of forum non conveniens under federal and state law. Of course, the federal courts may decide that issue only if we have jurisdiction over the case.

Appendix A

Although plaintiffs allege only state law claims, Dole argues, this case implicates the "uniquely federal" interest in foreign relations, and so must be heard in a federal forum. In essence, Dole interprets *Sabbatino* as creating an exception not only to *Erie*, but to the well-pleaded complaint rule as well.

Dole's position is not without support. In *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 543 (5th Cir. 1997), the Fifth Circuit asserted federal-question jurisdiction over a state tort action brought by hundreds of Peruvian citizens against an American company because of injuries they had allegedly suffered from exposure to toxic gases during copper smelting and refining operations in Peru. The court concluded that, although the Peruvian government was not a party, it had "participated substantially" in the mining project through ownership of the land and minerals on which the mining operation was located. *See id.* The court also noted that the mining industry made up a significant part of Peru's gross national product, and the Peruvian government had vigorously protested to our State Department that the case threatened Peru's sovereign interests. As a consequence, the Fifth Circuit held that the "plaintiffs' complaint raises substantial questions of federal common law by implicating important foreign policy concerns." *Id.* While reaching the opposite result on the facts before it, the Eleventh Circuit seems to have adopted the Fifth Circuit's theory in *Torres*. *See Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1377 (11th Cir. 1998) (noting that, "[w]here a state law action has as a substantial element an issue involving foreign relations or foreign policy matters, federal jurisdiction is present" but concluding that a suit brought by Venezuelan citizens injured in a pipeline explosion did not affect American foreign policy).

Torres and *Pacheco de Perez* relied principally on *Republic of Philippines v. Marcos*, 806 F.2d 344, 353 (2d Cir. 1986), which seems to have been the first case to conclude that "there is federal question jurisdiction over actions having important foreign policy implications."[4] In *Marcos*, the Republic of the Philippines sued its former dictator to enjoin him from disposing of property allegedly looted from the government and claimed as state property under an executive order of the Philippine government. *See id.* at 347. Because the Republic's claims rested on the Philippine executive order, *Marcos* could be read as an act of state case, and the Second Circuit may well have grounded federal jurisdiction entirely on that basis. *See id.* at 354 ("[F]ederal jurisdiction is present in any event because the claim raises, as a necessary element, the question whether

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4. *Torres* relied on only one other case, *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), which was an antitrust case that had nothing to do with foreign relations. *Torres* cited *Texas Industries* apparently because it, in turn, cited *Sabbatino*. *See Texas Indus.*, 451 U.S. at 641.

Torres also distinguished *Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 808 (5th Cir. 1992), which had held that the well-pleaded complaint rule applies with full force to cases arising under the federal common law of foreign relations. In *Aquafaith*, the defendants alleged that a maritime suit arose under federal law because the Philippine government had involved itself with the plaintiff's claims. *Aquafaith* rejected the claim on the ground that the foreign government's involvement didn't appear anywhere in the plaintiff's complaint. *Id.* at 809. *Torres* concluded that the plaintiff's claims in *Aquafaith* had not "necessarily implicate[d] vital economic and sovereign interests" of a foreign power, as they did in *Torres*. 113 F.3d at 542 n.8.

. . . the American courts [should] enforce the foreign government's directives to freeze property . . . .").

However, *Marcos* clearly *said* more, broadly suggesting that federal-question jurisdiction could "probably" be premised on the fact that a case may affect our nation's foreign relations, whether or not federal law is raised by the plaintiff's complaint: "[A]n action brought by a foreign government against its former head of state arises under federal common law because of the necessary implications of such an action for United States foreign relations." *Id.*[5] This reads far too much into *Sabbatino*. As noted, *Sabbatino* was about choice of law, not jurisdiction. The Court left no

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5. In reaching this conclusion, the Second Circuit relied on several authorities, none particularly helpful, among them Judge Friendly's opinion in *Republic of Iraq*, 353 F.2d at 50. To be sure, Judge Friendly stressed the need for national uniformity in cases concerning foreign acts of state, but *Republic of Iraq*, like *Sabbatino*, was a diversity case and thus has nothing to say about federal-question jurisdiction.

Marcos also seemed to draw support from *Franchise Tax Board*, 463 U.S. at 23, where the Supreme Court noted that federal-question jurisdiction may exist "even though the plaintiff pleads a state cause of action if federal law 'is so powerful as to displace entirely any state cause of action.' " *Marcos*, 806 F.2d at 354 (quoting *Franchise Tax Bd.*, 463 U.S. at 23). We find this reference to *Franchise Tax Board* curious. While the Supreme Court acknowledged that a state action may arise under federal law when Congress has established a federal cause of action preempting state law, *see Franchise Tax Bd.*, 463 U.S. at 23-24 (citing *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968)), we fail to see what analogous federal action *Marcos* had in mind when it suggested that a state dispute over real property might have been preempted by federal law.

doubt that the substantive law of foreign relations must be federal, and it stressed the need for national uniformity. But *Sabbatino* does not say that federal courts alone are competent to develop this body of law. To the contrary, *Sabbatino* notes that the law of foreign relations is like other "enclaves of federal judge-made law which bind the States," such as the rules filling the interstices of federal statutes and the laws regulating interstate boundary issues. *Sabbatino*, 376 U.S. at 426. The Court's reference to binding the states makes sense only if one assumes that state courts will be called upon to apply the law of foreign relations. *Sabbatino* says as much: "[T]he act of state doctrine is a principle of decision binding on federal and state courts alike . . . ." *Id.* at 427; *see also* Henry Friendly, *In Praise of Erie — and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964) ("*Erie* led to the emergence of a federal decisional law in areas of national concern that is truly uniform because, under the supremacy clause, it is binding in every forum . . . .").

State courts apply federal law in a wide variety of cases and, by doing so, they necessarily develop it. This does not undermine the nationwide uniformity of federal law much more than having somewhat different applications of federal law in the various federal circuits. Ultimately, the Supreme Court has the final say on any question of federal law, whether it arises in federal or state court, and this is thought sufficient to ensure nationwide uniformity in areas as diverse as criminal procedure, patent law and labor law.[6]

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6. *See, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (reviewing state interpretation of First Amendment); *Troxel v. Granville*, 530 U.S. 57 (2000) (reviewing state interpretation of

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We see no reason to treat the federal common law of foreign relations any differently than other areas of federal law. Certainly, federal courts have preeminence in developing all areas of federal law by virtue of the fact that almost all cases premised on federal law may be brought in or removed to federal court. In addition, Congress has provided federal jurisdiction in certain cases implicating our foreign relations, regardless of the nature of the claim. *See, e.g.*, 28 U.S.C. § 1251(b)(1) (suits where ambassadors or other foreign government officials are parties); *id.* § 1351 (suits against foreign consuls or other diplomatic personnel); *id.* § 1330 (suits against a foreign state); *see also id.* § 1350 (suits brought by an alien for a tort committed in violation of international law). What Congress has not done is to extend federal-question jurisdiction to all suits where the federal common law of foreign relations might arise as an issue. We interpret congressional silence outside these specific grants of jurisdiction as an endorsement of the well-pleaded complaint rule.

We therefore decline to follow *Marcos*, *Torres* and *Pacheco de Perez* insofar as they stand for the proposition that the federal courts may assert jurisdiction over a case simply because a foreign government has expressed a special

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substantive due process); *Illinois v. Wardlow*, 528 U.S. 119 (2000) (reviewing state interpretation of the Fourth Amendment); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (reviewing state interpretation of dormant Commerce Clause); *Oregon v. Elstad*, 470 U.S. 298 (1985) (reviewing state interpretation of the Fifth Amendment); *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969) (reviewing state decision under the patent laws); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962) (reviewing state interpretation of federal labor laws).

interest in its outcome. *Accord In re Tobacco/Governmental Health Care Costs Litig.*, 100 F. Supp. 2d 31, 36-38 (D.D.C. 2000). It may well be that our foreign relations will be implicated by the pendency of a lawsuit on a subject that affects that government's sovereign interests; the courts in *Marcos* and *Torres* certainly believed this to be the case. But we see no logical connection between such an effect and the assertion of federal-question jurisdiction. That the case is litigated in federal court, rather than state court, will not reduce the impact of the case on the foreign government. Federal judges cannot dismiss a case because a foreign government finds it irksome, nor can they tailor their rulings to accommodate a non-party. Federal judges, like state judges, are bound to decide cases before them according to the rule of law. If a foreign government finds the litigation offensive, it may lodge a protest with our government; our political branches can then respond in whatever way they deem appropriate — up to and including passing legislation. Our government may, of course, communicate its own views as to the conduct of the litigation, and the court — whether state or federal — can take those views into account.[7] But it

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7. As Judge Paul Friedman noted in *In re Tobacco Litigation:*

> [T]o the extent that the United States government is concerned about potential adverse foreign relations consequences from the resolution of these lawsuits, the Executive Branch possesses the competence, capacity and incentive to make its view known either to this Court or the state courts in which the suits were brought. The Executive Branch is responsible for the conduct of foreign affairs and may address any potential foreign relations issues that may arise in these cases.

100 F. Supp. 2d at 38.

is quite a different matter to suggest that courts — state or federal — will tailor their rulings to accommodate the expressed interests of a foreign nation that is not even a party.

Nor do we understand how a court can go about evaluating the foreign policy implications of another government's expression of interest. Assuming that foreign relations are an appropriate consideration at all, the relevant question is not whether the foreign government is pleased or displeased by the litigation, but how the case affects the interests of the United States. That is an inherently political judgment, one that courts — whether state or federal — are not competent to make. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983) ("This Court has little competence in determining precisely when foreign nations will be offended by particular acts . . . ."); *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial."); *In re Tobacco Litig.*, 100 F. Supp. 2d at 38 ("[T]he federal courts have little context or expertise by which to analyze and address the potential implications of a lawsuit on foreign relations."). If courts were to take the interests of the foreign government into account, they would be conducting foreign policy by deciding whether it serves our national interests to continue with the litigation, dismiss it on some ground such as forum non conveniens, or deal with it in some other way.[8] *See* Jack L.

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8. We note, for example, that the Fifth Circuit in *Torres* had before it an amicus brief from the government of Peru, but none from our own government. Based on Peru's representations, the court concluded that Peru had a vital interest in the case and the litigation

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Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1667 (1997). Because such political judgments are not within the competence of either state or federal courts, we can see no support for the proposition that federal courts are better equipped than state courts to deal with cases raising such concerns.[9]

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might adversely affect Peru's relations with the United States. *See Torres*, 113 F.3d at 542-43. Apparently, the Fifth Circuit believed that it served the interests of the United States to avoid this consequence, so it asserted jurisdiction and affirmed the dismissal on grounds of forum non conveniens. *See id.* at 543-44. But it is just as plausible that our government did not express its views because it was indifferent to Peru's discomfort or even reveled in it. Courts should not put themselves in the position of having to make such judgments.

9. We are particularly troubled by the suggestion in *Pacheco de Perez* (echoed by Dole in our case) that federal jurisdiction will hinge on whether a foreign government has taken a position in support or in opposition to the litigation. *See* 139 F.3d at 1378. The Eleventh Circuit noted that the Peruvian government in *Torres* had opposed the litigation, both in a communication to our State Department and an amicus brief filed in the Fifth Circuit. The Eleventh Circuit found it significant that, by contrast, "the Venezuelan government has taken no position on whether [the *Pacheco de Perez*] lawsuit proceeds in the United States or in Venezuela." *Id.* Inviting foreign governments to tell us how litigation in our courts affects their interests can only put us in the awkward position of causing an affront to those governments if their interests are not respected. We consider it far more prudent to state clearly that the effect of the litigation on the economies of foreign countries is of absolutely no consequence to our jurisdiction.

As Justice Frankfurter noted in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 (1959), federal courts must be hesitant "to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." If federal courts are so much better suited than state courts for handling cases that might raise foreign policy concerns, Congress will surely pass a statute giving us that jurisdiction. Because we see no evidence that Congress meant for the federal courts to assert jurisdiction over cases simply because foreign governments have an interest in them, we must part company with our sister circuits. *Accord In re Tobacco Litig.*, 100 F. Supp. 2d at 36.

B. *Foreign Sovereign Immunities Act*

As an alternative source of jurisdiction, the Dead Sea Companies argue that they are instrumentalities of a foreign state under the FSIA. *See* 28 U.S.C. §§ 1330, 1603. The FSIA grants the federal courts jurisdiction over an action brought against "an agency or instrumentality of a foreign state," *id.* § 1603(a), which is defined to include any entity that is "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id.* § 1603(b)(2).

Until the 1990s, the government of Israel indirectly owned a majority of shares in both companies by owning all the shares of their parent, Israel Chemicals Limited. An Israeli statute, the Government Companies Law, granted the Israeli government a veto over certain decisions of the Dead Sea Companies, including the appointment of the directors and

officers, changes in their capital structures, and the use of corporate profits. The Companies also emphasize that the government of Israel exerted control over them through the state's ownership of the Dead Sea's mineral resources on which the Companies relied for their enterprise.

1. The Israeli government privatized most of its holdings in Israel Chemicals Limited during the 1990s and so, by the time this suit was filed in 1997, the government no longer owned, indirectly or otherwise, a majority of the shares in the Dead Sea Companies. Because the FSIA grants jurisdiction to the federal courts where an entity "*is* an organ of a foreign state or political subdivision thereof," *id.* § 1603(b)(2) (emphasis added), we must first consider what the meaning of "is," is.[10] Does the FSIA apply to companies that were owned by the state at the time of the allegedly tortious conduct, but have since been cut free?

In *Straub v. A P Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994), we held that the FSIA applies when a party is a state instrumentality at the time the lawsuit is filed, even though it was not an instrumentality at the time of the alleged wrongdoing. *Straub* did not decide whether the FSIA would also apply in the converse case involving entities that were no longer instrumentalities, but had been at the time of the alleged wrongdoing. *See id.* However, all courts that have considered the issue have held that the FSIA applies to an entity that was a foreign state at the time of the wrongdoing, even if the entity is no longer a state instrumentality.

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10. We are not the first federal employees to tackle this question. *See* Robert Blecker, *How Does Congress Define "Perjury"?*, Wall St. J., Dec. 9, 1998, at A22.

See, e.g., Pere v. Nuovo Pignone, Inc., 150 F.3d 477, 480-81 (5th Cir. 1998); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1381-82 (8th Cir. 1993); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988).

We do not find this question as easy as the unanimity of other circuits would suggest. By its terms, the FSIA applies only to an entity that "is" a foreign state at the time of the suit. 28 U.S.C. § 1603(b)(2). The statute does not say that it applies to an entity that used to be a state, although Congress could easily have said so. Moreover, the statute contains special rules for service of process on the foreign state, *see id.* § 1608, and for enforcing a judgment against the foreign state. *See id.* §§ 1609-10. We have no doubt that, in enacting the FSIA, Congress had in mind suits brought against entities that are currently foreign states.

It is unclear that the policies of the FSIA would be served by extending that immunity to entities that are now private but were state actors at the time of the alleged wrong. The FSIA seeks to avoid affronting other governments by making it hard for private litigants to haul them into court. *See First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972) (plurality op.). Wrongs committed by foreign nations are presumed to raise questions of foreign policy rather than law, and an aggrieved party ordinarily must seek redress through diplomatic channels, rather than through a civil complaint. *See id.* (quoting *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812)). But when the entity is no longer part of the foreign state, it is not clear that the civil suit will force the state to appear and defend

itself in an American tribunal.[11] Nor will American courts necessarily have to worry about ordering a foreign state to pay money to a private litigant. At the same time, diplomatic channels may be of no avail in resolving a dispute between private parties.

Of course, a case against an entity formerly owned by the state may raise other kinds of concerns. Where the defendant was a foreign state at the time of the alleged wrong, the complaint perforce alleges that the foreign state did something wrong. By adjudicating that claim, the court may have to pass judgment on the acts or decisions of a foreign sovereign. But the merits of such acts may well be insulated from judicial scrutiny by the act of state doctrine and, in any event, the affront to the foreign sovereign will be remote and indirect if it is not held answerable for the harm it may have caused. If concern over adjudicating whether the foreign sovereign acted wrongfully were the key to FSIA immunity, *Straub* should have come out the other way because the entity that committed the wrong there was not a government entity at the time of the alleged wrongdoing. There is thus a plausible basis for concluding that the FSIA does not come into play where a suit is brought against a private entity that was a foreign state at the time of the alleged wrongdoing, but is no longer.

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11. We recognize that state officials formerly involved with the then-state entity might be drawn into the litigation, for instance as key witnesses, a circumstance that might affect the immunity analysis. *Cf. Clinton v. Jones*, 520 U.S. 681, 720 (1997) (Breyer, J., concurring) (noting that "the Court, in numerous other cases, has found the problem of time and energy distraction a critically important consideration militating in favor of a grant of immunity.").

However, the question is a close one, and the answer is ultimately not dispositive here. We will therefore assume for the purposes of this case that the FSIA would grant federal jurisdiction over an entity that at the time of the tortious conduct was — but no longer is — a government instrumentality.

2. Proceeding on that assumption, we turn to whether the Dead Sea Companies were in fact instrumentalities of the Israeli government. In *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995), we held that under the FSIA, a corporation owned by an instrumentality of a foreign government is not itself an instrumentality of that government. An instrumentality includes any entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2). *Gates* read that provision as limiting an instrumentality to the first tier of ownership: those entities owned directly by the foreign state itself or by a political subdivision. It held that a corporation wholly owned by an instrumentality of a foreign government is not a foreign instrumentality under the FSIA.

Because the Dead Sea Companies were never owned directly by the Israeli government, *Gates* would seem to foreclose their claim to be instrumentalities through stock ownership. Because they must, the Companies do their best to distinguish *Gates*. First, they argue that *Gates* did not consider whether the indirect ownership of stock qualified as an "other ownership interest" under section 1603(b)(2). An instrumentality under the FSIA includes entities in which the foreign government owns a majority of the shares or some

"other ownership interest." We decline to read "other ownership interest" in such a way as to make the majority-shareholder requirement superfluous. Instead, we read it simply to describe some other form of ownership not called shares of stock. That provision does not include the indirect ownership of shares specifically foreclosed by *Gates*.

Second, the Dead Sea Companies suggest that *Gates* held only that the subsidiary of an *organ* of a foreign state is not an instrumentality, while a subsidiary of a state-owned corporation may be one. We see no rationale supporting such a distinction. If anything, we would more readily view an organ of a foreign state as an extension of the government than we would so view a state-owned business. Moreover, we already have read *Gates* for the broader holding that "an entity wholly owned by 'an agency or instrumentality of a foreign state' is not owned by a 'foreign state or a political subdivision thereof.' " *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996) (describing the holding in *Gates*). Because an instrumentality under the FSIA includes both organs and government-owned corporations, *Gates*'s holding covers the Israeli government's interest in the Dead Sea Companies.

The Companies point out that several other circuits have disagreed with *Gates* and held that subsidiaries of a corporation owned by a foreign state are in fact instrumentalities under the FSIA. *See, e.g., Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001); *In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932, 941 (7th Cir. 1996); *Gould*, 853 F.2d at 448-50. They argue, not implausibly, that federal courts

should not care how a foreign government structures its ownership interests so long as it, in fact, owns a majority interest in a particular corporation. But none of this matters, because *Gates* decided this question, and we are bound by its authority.

3. In the alternative, the Dead Sea Companies argue that they were "organs" of the Israeli government under section 1603(b)(2). In defining whether an entity is an organ, courts consider whether the entity engages in a public activity on behalf of the foreign government. In making this determination, courts examine the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law. *See Corporacion Mexicana*, 89 F.3d at 654-55; *Gates*, 54 F.3d at 1461. The entity may be an organ even if it has some autonomy from the foreign government. *See id.* ("[T]hat the [state] is not directly involved in the day-to-day activities of [the entity] does not mean that it is not exercising control over the entity . . . .").

Courts have recognized as organs such quasi-public entities as national banks, state universities and public television networks. In *Gates*, we held that an industry board that regulated the Canadian pork market was an organ where it exercised regulatory authority delegated by the government; its decisions could be appealed to a government agency; and its members enjoyed immunity from suit for their official duties. *See id.* Closer to our case, we have held that a Mexican oil refinery was an organ where it was entirely owned by the government; controlled by government appointees; employed

only public servants; and had the exclusive responsibility for refining and distributing Mexican government property. *See Corporacion Mexicana*, 89 F.3d at 654-55; *see also Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 848 (5th Cir.) (a Syrian petroleum company was a government organ where Syria had created the company and granted it exclusive rights to exploit the country's petroleum reserves for the benefit of the state, rather than in pursuit of profits, and half the directors were high-level government officials), *cert. denied*, 121 S. Ct. 426 (2000).

The Dead Sea Companies argue that, like the oil company in *Corporacion Mexicana*, the Companies were government organs created by Israel for the purpose of exploiting the Dead Sea resources owned by the government. The Dead Sea Companies were classified as "government companies" under Israeli law, which gave the government certain privileges reflecting its ownership stake. The government had the right to approve the appointment of directors and officers, as well as any changes in the capital structure of the Companies, and the Companies were obliged to present an annual budget and financial statement to various government ministries. The government could constrain the use of the Companies' profits as well as the salaries of the directors and officers.

Although Israeli law granted such authority directly to the Israeli government, it is not considerably different from the control a majority shareholder would enjoy under American corporate law. In contrast to the oil refinery in *Corporacion Mexicana*, the Dead Sea Companies were not run by government appointees; their employees were not

treated as civil servants; nor were the Companies wholly owned by the government of Israel. The Companies could sue and be sued, and could in fact sue the government of Israel (although official Israeli documents describe such disputes as between "a government company and another government body"). Nor did the Companies exercise any regulatory authority, as did the entity in *Gates*. These factors support the district court's view of the Companies as independent commercial enterprises, heavily regulated, but acting to maximize profits rather than pursue public objectives.[12] Although the question is close, we hold that the Dead Sea Companies were not organs of the Israeli government, but indirectly owned commercial operations, which do not qualify as instrumentalities under the FSIA.

III

The federal courts do not have jurisdiction over this case under either 28 U.S.C. § 1331 or 28 U.S.C. § 1330. Accordingly, we **REVERSE** the judgment of the district court and **REMAND** with instructions that the district court remand the case to Hawaii state court.

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12. These factors also distinguish the Dead Sea Companies from the Syrian oil company in *Kelly*, 213 F.3d at 847-48, which was a non-profit-making entity, half of whose directors were high-level Syrian government officials.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII DENYING DOLE DEFENDANTS' AND DEL MONTE DEFENDANTS' MOTIONS TO ALTER OR AMEND JUDGMENT UNDER RULE 59(e) DATED AND FILED JUNE 16, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 97-01516 HG

GERARDO DENNIS PATRICKSON, et al.,

Plaintiffs,

vs.

DOLE FOOD COMPANY, INC., et al.,

Defendants.

DOLE FOOD COMPANY, INC.,

Defendant/Third-
Party Plaintiff,

vs.

DEAD SEA BROMINE CO., LTD., and
BROMINE COMPOUNDS LIMITED,

Third-Party Defendants.

Appendix B

ORDER DENYING DOLE DEFENDANTS' AND DEL MONTE DEFENDANTS' MOTIONS TO ALTER OR AMEND JUDGMENT UNDER RULE 59(e)

I. INTRODUCTION

Plaintiffs bring this action based on claims that arose out of their alleged exposure to the chemical pesticide dibromochloropropane ("DBCP") while working on farms in Costa Rica, Ecuador, Guatemala, and Panama. Following removal from state court, Plaintiffs filed motions to remand and certain Defendants filed a motion to dismiss. The Court granted a conditional dismissal on forum non conveniens grounds by written Order entered September 9, 1998. On October 19, 1998, the Court granted Plaintiffs' Motion for Reconsideration, granted certain Defendants' Motion for Clarification, and amended deadlines contained in the September 9, 1998 Order.

On March 8, 1999, the Court filed its Order dismissing the action. In its Order, the Court struck portions of Dole Defendants'[1] and Del Monte Defendants'[2] Agreements which attempted to limit the countries in which Defendants would

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1. Defendants Dole Food Company, Inc., Dole Fresh Fruit Company, Dole Fresh Fruit International, Ltd., Dole Fresh Fruit International, Inc., Standard Fruit Company, Standard Fruit and Steamship Company, Standard Fruit Company de Costa Rica, S.A., and Standard Fruit de Honduras, S.A.

2. Defendants Del Monte Fresh Produce Company, Del Monte Fresh Produce N.A., Inc., Fresh Del Monte N.V., and Del Monte Fresh Produce Hawaii, Inc.

submit to jurisdiction, finding that the Court had not made any of the factual determinations necessary to determine which Defendants operated in Plaintiffs' countries. On March 22, 1999, Plaintiffs filed a Motion to Reconsider Under Rule 59(e). On March 19, 1999, the Dole Defendants filed their Motion to Alter or Amend Judgment Under Rule 59(e), and the Del Monte Defendants filed their Motion to Alter or Amend Judgment Under Rule 59(e) on March 22, 1999.

The Dole Defendants' and the Del Monte Defendants' Motions request that the Court agree to accept their proposed geographic limitations. For the reasons set forth below, the Court denies the Dole Defendants' and the Del Monte Defendants' Motions.

II. BACKGROUND

On September 9, 1998, the Court entered an Order Denying Plaintiffs' Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction and Denying Plaintiffs' Motion for Remand and in Opposition to the Supplemental Grounds for Removal and Granting Certain Defendants' Motion to Dismiss and for Injunctive Relief Filed December 24, 1997 and Denying Plaintiffs' Motion to Strike Defendants' Supplemental Affidavits. On October 19, 1998, the Court entered an order amending the September 9, 1998 Order. The Dole Defendants' and the Del Monte Defendants' Motions were filed herein on March 19, 1999 and March 22, 1999 respectively.

Defendant Pineapple Growers Association of Hawaii filed a Joinder to both Dole Defendants' and Del Monte

Defendants' Motions on March 23, 1999 and March 25, 1999. Plaintiffs filed a Response to the Dole Defendants' and the Del Monte Defendants' Motions on April 2, 1999. Four Defendants filed statements of no opposition to either Motion: Dow Chemical Corp. (March 23, 1999); Dead Sea Bromine Co., Ltd. (April 1, 1999); Bromine Compounds Ltd. (April 1, 1999); Occidental Chemical Corp. (April 2, 1999). On April 14, 1999, Dole Defendants filed a Reply Memorandum to Plaintiffs' Response. On April 15, 1999 Del Monte Defendants filed a Reply to Plaintiffs' Response.

III. STANDARD OF REVIEW

A party seeking reconsideration of a decision of the Court under Rule 59(e) of the Federal Rules of Civil Procedure must satisfy two burdens:

> First, it must demonstrate some reason why the court should reconsider its prior decision. Second, it must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.

All Hawaii Tours, Corp. v. Polynesian Cultural Ctr., 116 F.R.D. 645, 649 (D. Haw. 1987), *rev'd on other grounds*, 855 F.2d 860 (9th Cir. 1988). Motions under Rule 59(e) are granted upon three grounds: (1) if the district court is presented with newly discovered evidence; (2) if the district court committed clear error or the initial decision was manifestly unjust; or (3) if there is an intervening change in controlling law. *School Dist. No. 1J., Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), *cert. denied*,

512 U.S. 1236 (1994). A motion to amend or alter under Rule 59(e) ". . . may not be used to relitigate old matters or to raise arguments or present evidence that could have been raised prior to entry of judgment. *Demasse v. ITT Corp.*, 915 F. Supp. 1040, 1048 (D. Ariz. 1995).

IV. DISCUSSION

A. *Dole Defendants' Motion to Alter or Amend Judgment Under Rule 59(e)*

The Dole Defendants contend that the Court, in its March 8, 1999 Order Accepting in Part and Rejecting in Part the Dole Defendants' Agreements Regarding Conditions of Dismissal for Forum Non Conveniens, erred by failing to limit Dole Defendants' consent to jurisdiction to certain countries. The Dole Defendants assert that Plaintiffs have never alleged that Dole Defendants operated banana farms in Guatemala or Panama during the relevant time period and the Court erred in finding that Plaintiffs have asserted as much.

Defendants' assertion is incorrect. In Plaintiffs' Amended Complaint filed March 3, 1998, Plaintiffs clearly alleged that Plaintiffs were employed by Defendants in Plaintiffs' native countries and were exposed to Defendants' DBCP products, between 1959 and the present, while employed in the commercial cultivation of bananas in those countries. (Pl.s' Am. Complaint at ¶¶ 33-34).

As for Dole Defendants' factual proposition that they only have operations in the limited jurisdictions mentioned

and never operated banana farms in those countries during the relevant time period, this Court has already considered and rejected this argument in the March 8, 1999 Order. As the Court stated previously, this Court has made no factual findings as to the extent of any Defendant's banana operations or DBCP usage, or the dates in which these actions occurred. These matters are properly before the foreign courts. The Court, by holding the foreign jurisdictions to be adequate alternative fora, has already determined that these Courts are capable of determining the existence and extent of liability, if any. Because the Dole Defendants have not alleged any facts or additional information that would allow the Court to change its decision, nor argued any intervening change in the law or produced any new evidence, the Dole Defendants' Motion to Alter or Amend Judgment Under Rule 59(e) is DENIED.

B. *Del Monte Defendants' Motion to Alter or Amend Judgment Under Rule 59(e)*

Del Monte Defendants contend that the Court, in its March 8, 1999 Order Accepting in Part and Rejecting in Part the Del Monte Defendants' Agreement Regarding Conditions of Dismissal for Forum Non Conveniens, erred by failing to limit the Del Monte Defendants' consent to jurisdiction to certain countries. The Del Monte Defendants' assert that Plaintiffs have never alleged that the Del Monte Defendants operated banana farms in Ecuador during the relevant time period and the Court erred in finding that Plaintiffs have done so.

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As stated above, the Court finds that Plaintiffs have sufficiently alleged that Defendants operated banana farms in Ecuador during the relevant time period, and the Del Monte Defendants have not alleged any facts or additional information that would allow the Court to change its decision. The Court further finds that Defendants have not argued any intervening change in the law or produced any new evidence. Accordingly, the Del Monte Defendants' Motion to Alter or Amend Judgment Under Rule 59(e) is DENIED.

V. CONCLUSION

In accordance with the foregoing, IT IS HEREBY ORDERED that:

1. The Dole Defendants' Motion to Alter or Amend Judgment Under Rule 59(e) filed March 19, 1999 is DENIED.

2. The Del Monte Defendants' Motion to Alter or Amend Judgment Under Rule 59(e) filed March 22, 1999 is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, 6-16-99

s/ Helen Gillmor
HELEN GILLMOR
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII DISMISSING ACTION, ETC. DATED AND FILED MARCH 8, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 97-01516 HG

GERARDO DENNIS PATRICKSON, et al.,

Plaintiffs,

vs.

DOLE FOOD COMPANY, INC., et al.,

Defendants.

DOLE FOOD COMPANY, INC.,

Defendant/Third-
Party Plaintiff,

vs.

DEAD SEA BROMINE CO., LTD., and
BROMINE COMPOUNDS LIMITED,

Third-Party Defendants.

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ORDER DISMISSING ACTION
and
ACCEPTING IN PART AND REJECTING IN PART DEL MONTE DEFENDANTS' AGREEMENTS REGARDING CONDITIONS OF DISMISSAL FOR FORUM NON CONVENIENS
and
ACCEPTING IN PART AND REJECTING IN PART THE DOLE DEFENDANTS' AGREEMENTS REGARDING CONDITIONS OF DISMISSAL FOR FORUM NON CONVENIENS
and
ACCEPTING AMVAC CHEMICAL CORPORATION'S NOTICE OF AGREEMENTS SATISFYING FORUM NON CONVENIENS CONDITIONS
and
ACCEPTING DEFENDANT THE DOW CHEMICAL COMPANY'S AGREEMENTS REGARDING CONDITIONS OF DISMISSAL FOR FORUM NON CONVENIENS
and
ACCEPTING DEFENDANT OCCIDENTAL CHEMICAL CORPORATION'S AGREEMENTS REGARDING CONDITIONS OF DISMISSAL FOR FORUM NON CONVENIENS
and
ACCEPTING DEFENDANT PINEAPPLE GROWERS ASSOCIATION OF HAWAII'S AGREEMENTS REGARDING CONDITIONS OF DISMISSAL FOR FORUM NON CONVENIENS
and

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ACCEPTING SHELL OIL COMPANY'S NOTICE OF AGREEMENTS SATISFYING FORUM NON CONVENIENS CONDITIONS

and

ACCEPTING DEFENDANTS CHIQUITA BRANDS, INC., CHIQUITA BRANDS INTERNATIONAL, INC. AND MARITROP TRADING CORPORATION'S RESPONSE TO THIS COURT'S SEPTEMBER 9, 1998 AND OCTOBER 19, 1998 ORDERS ESTABLISHING CONDITIONS FOR DISMISSAL FORUM NON CONVENIENS

and

DENYING IN PART AND SUSTAINING IN PART PLAINTIFFS' AMENDED OBJECTIONS TO DEFENDANTS' STIPULATIONS AND AGREEMENTS

Plaintiffs bring this action based on claims that arose out of their alleged exposure to the chemical pesticide dibromochloropropane ("DBCP") while working on farms in Costa Rica, Ecuador, Guatemala, and Panama. Following removal from state court, Plaintiffs filed motions to remand and certain Defendants filed a motion to dismiss. The Court granted a conditional dismissal on forum non conveniens grounds an September 9, 1998. On October 19, 1998, the Court amended deadlines contained in the September 9, 1998 Order.

The Court, in granting Defendants' motion for dismissal, required the Defendants to agree to conditions in order to achieve dismissal on forum non conveniens grounds. Defendants submitted their stipulations, waivers, and agreements (collectively "agreements") in a timely fashion.

Appendix C

Plaintiffs filed objections to which certain Defendants replied. Plaintiffs then amended their objections to which certain Defendants also replied. After considering the papers, the Court FINDS that the Defendants have complied with the requirements of the Court's September 9, 1998 and October 19, 1998 Orders and the action is DISMISSED.

One objection raised by Plaintiffs regarding the agreements of the Del Monte Defendants[1] and the Dole Defendants[2] is SUSTAINED. The two Defendants have attempted to limit their agreements to countries in which they believe they might be subject to liability due to their banana growing operations. As the issue is a factual matter not addressed by this Court, the Court STRIKES those portions of the Dole Defendants and Del Monte Defendants' agreements which purport to limit the agreement to the countries in which they allege to have had banana growing operations. The agreements are limited to actions filed in a plaintiff's home country or in a country where plaintiff suffered an injury. (Order, Oct. 19, 1998 at 8.)

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1. Defendants Del Monte Fresh Produce Company, Del Monte Fresh Produce N.A., Inc., Fresh Del Monte N.V., and Del Monte Fresh Produce Hawaii, Inc.

2. Defendants Dole Food Company, Inc., Dole Fresh Fruit Company, Dole Fresh Fruit International, Ltd., Dole Fresh Fruit International, Inc., Standard Fruit Company, Standard Fruit and Steamship Company, Standard Fruit Company de Costa Rica, S.A., and Standard Fruit de Honduras, S.A.

Appendix C

PROCEDURAL BACKGROUND

The Court entered an Order Denying Plaintiffs' Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction and Denying Plaintiffs' Motion for Remand and in Opposition to the Supplemental Grounds for Removal and Granting Certain Defendants' Motion to Dismiss and for Injunctive Relief Filed December 24, 1997 and Denying Plaintiffs' Motion to Strike Defendants' Supplemental Affidavits on September 9, 1998. Rased on the stipulation of the parties and Plaintiffs' Second Motion to Alter or Amend Judgment under Rule 59(e), the Court, by written Order entered October 19, 1998, amended the September 9, 1998 Order and extended the deadlines for compliance with the September 9, 1998 Order. The Order as amended provides in relevant part:

> "This action will be dismissed 180 days after the filing date of this Order provided that:
>
> a. Defendants have either waived or accepted service of process and waived any other jurisdictional defense, within 100 days after this Order is filed, in any action commenced by a plaintiff in these actions in his home country or in the country in which his injury occurred. Any plaintiff desiring to bring such an action will do so within 90 days after the filing of this Order;
>
> b. Defendants have waived, within 100 days after the filing of this order, any

limitations-based defense that has matured since the commencement of this action;

c. Defendants have submitted, within 100 days after the filing of this Order, an agreement binding them to satisfy any final judgment rendered in favor of Plaintiffs in a foreign court;

d. Defendants have complied with expedited discovery in the United States under the supervision of this Court within 90 days after this Order is filed;

e. Defendants have stipulated, within 100 days after the filing of this Order, that any discovery conducted during the pendency of this action may be used in any foreign proceeding to the same extent as if it had been conducted in proceedings there.

Any objections by Plaintiffs concerning the waivers, agreements, and stipulations pursuant to subparagraphs a., b., c. or e. above are to be filed within 110 days after the filing of this Order. Any reply to such objections will be filed within 120 days after the filing of this Order." (Order of Oct. 19, 1998 at 8-9.)

In order to comply, the Defendants filed the following agreements: (1) Del Monte Defendants' Agreements Regarding Conditions of Dismissal for Forum Non

Conveniens (October 19, 1998); (2) The Dole Defendants' Agreements Regarding Conditions of Dismissal for Forum Non Conveniens (October 19, 1998); (3) Amvac Chemical Corporation's Notice of Agreements Satisfying Forum Non Conveniens Conditions (October 19, 1998); (4) Defendant The Dow Chemical Company's Agreements Regarding Conditions of Dismissal For Forum Non Conveniens (October 19, 1998); (5) Defendant Occidental Chemical Corporation's Agreements Regarding Conditions of Dismissal for Forum Non Conveniens (October 19, 1998); (6) Defendant Pineapple Growers Association of Hawaii's Agreements Regarding Conditions of Dismissal for Forum Non Conveniens (October 19, 1998); (7) Shell Oil Company's Notice of Agreements Satisfying Forum Non Conveniens Conditions (October 19, 1998); and (8) Defendants Chiquita Brands, Inc., Chiquita Brands International, Inc. and Maritrop Trading Corporation's[3] Response to this Court's September 9, 1998 and October 19, 1998 Orders Establishing Conditions for Dismissal Forum Non Conveniens (December 18, 1998). Plaintiffs filed objections to these agreements on December 28, 30, and 31, 1998[4]. Defendant The Dow Chemical Company replied to these objections on January 7, 1999[5] and

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3. Chiquita Defendants.

4. Plaintiffs apparently filed their objections three times. (*See* Docket No. 224, Docket No. 225, and Docket No. 227.)

5. The Chiquita Defendants, the Dole Defendants, Amvac Chemical Corp. (with American Vanguard Corp.(sic)), Occidental Chemical Corp., and the Del Monte Defendants all filed statements of joinder in The Dow Chemical Company's reply to the Plaintiffs' objections.

filed an Errata to its Reply on January 15, 1999. On January 8, 1999, Plaintiffs amended their objections. Defendant The Dow Chemical Company filed a reply to the amended objections on January 28, 1999.[6]

DISCUSSION

Plaintiffs make essentially seven objections to the Defendants' agreements. First, the Plaintiffs object to the Defendants limiting their agreements to the named Plaintiffs. Second, Plaintiffs object to the requirement that service be effected in accordance with the law of the jurisdiction. Third, Plaintiffs object to language relating to discovery. Fourth, Plaintiffs object to limitations on the Defendants' agreements regarding the enforcement of foreign judgments. Fifth, Plaintiffs object to attempts to limit the jurisdictions in which the Defendants will submit to litigation. Sixth, Plaintiffs object to reservations of the right to argue lack of personal jurisdiction should the case return to this Court. Seventh, Plaintiffs argue that the Defendants' agreements do not raise any issues regarding Plaintiffs' compliance with the Orders of September 9 and October 19, 1998. Plaintiffs worry that the Defendants may attempt to raise arguments of non-compliance by the Plaintiffs should the matter ever return to this Court. This Order analyzes each objection presented by the Plaintiffs, in turn.

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6. The Dole Defendants, the Chiquita Defendants, Occidental Chemical Corp., and Amvac Chemical Corp. all filed statements of joinder in The Dow Chemical Company's reply to the Plaintiffs' amended objections.

Appendix C

1. *Limitation to Named Plaintiffs.*

Plaintiffs complain that Defendants' agreements are limited to the named Plaintiffs and do not include putative class members. This Court never reached the question of whether a class was appropriate in this case and the Court never certified a class. The Court's September 9, 1998 Order directs Defendants to consider only actions filed by the named Plaintiffs. (*See, e.g.*, September 9, 1998 Order at 62, ¶ a. ("... in any action commenced by a plaintiff.") The Court did not consider or give any indication that the agreements apply to any other party than the named Plaintiffs.

2. *Service of Process*

Plaintiffs argue that the Defendants should not force Plaintiffs to comply with the foreign rules regarding service of process in the foreign jurisdictions. Defendants have appointed agents in the foreign countries for service of process. The agents are authorized to accept service of process according to the laws of the country in which the suit is filed. The Defendants have waved the right to assert defenses based on lack of in personam jurisdiction.

The Court required the Defendants to accept or waive service of process within 100 days of the September 9, 1998 Order. All service should have been accepted or waived by the Defendants by December 19, 1998. Plaintiffs, in their objections, fail to assert any specific instance where Defendants have failed to accept or waive service of process by the December 19, 1998 deadline. Insofar as the Defendants might assert objections in the foreign fora based on improper service, that matter is properly before the foreign court.

Appendix C

3. *Discovery*

The Plaintiffs argue that the Defendants should agree to the complete admissibility of material made available to them in expedited discovery before this Court. The Defendants here have all fashioned agreements which closely mirror the language of the Court's September 9, 1998 Order as amended. They have all agreed that any "discovery conducted during the pendency of this action may be used in any foreign proceeding to the same extent as if it had been conducted in proceedings initiated there." (*E.g.*, Del Monte Defs.' Agreements at 4.) Plaintiffs' contention that the material obtained here by discovery should be automatically admissible in the foreign jurisdiction violates the spirit of the Court's Orders. If the Court adopted Plaintiffs' position, such a rule could result in the material being able to be used to a greater extent there than it would be allowed to be used here, given that discovery pursuant to Rule 26 is allowable for any evidence which may reasonably lead to admissible evidence.

4. *Enforcement of Final Judgments*

Defendants agree to satisfy any final judgment rendered against them and in favor of Plaintiffs in a foreign lawsuit. They purport to retain the right to contest such a judgment if it was obtained by fraud, without due process of law, or without sufficient notice of the proceedings. The defendants further reserve the right to contest any judgment that results from a bill of attainder or ex post facto. (*See, e.g.*, Dole Defendants' Agreement at 5.) These issues seem to have been raised by Defendants as an attempt to reserve the usual

defenses to a foreign judgment under general principles of comity. *See generally In Re Union Carbide*, 809 F.2d 195, 205-6 (2d Cir. 1987)

General principles of comity allow defendants in an action to enforce a foreign judgment to raise the defenses of fraud, lack of due process, and lack of sufficient notice. *See id.* This Court does not seek to bind Defendants to a final judgment obtained by fraud, without due process of law, or lack of sufficient notice.

Although unlikely, if the Defendants were able to demonstrate that the judgment obtained by Plaintiffs was the result of a legislative act and not a judicial one, they could similarly raise the defenses of bill of attainder or ex post facto laws under principles of comity.

5. *Limitations on Jurisdictions*

Plaintiffs object to wording in two or the agreements where the Del Monte and the Dole Defendants have attempted impermissibly to limit their consent to jurisdiction to certain countries. These Defendants contend they need only submit to the jurisdiction of those countries in which they had banana operations at the time of DBCP use. The Defendants rely on discovery material obtained in similar cases litigated elsewhere for the factual proposition that they did not have banana operations in each of the countries where Plaintiffs allege they lived and/or were injured.

The Del Monte Defendants include in their agreement the following clause. "4. With respect to the assertion of

claims against Del Monte, the lawsuit must have been brought in Costa Rica or Guatemala." (Del Monte Defs.' Agreement at 3.) The Dole Defendants include the following clauses: "6. As to Dole Food Company, Inc., Dole Fresh Fruit Company, Standard Fruit Company, and Standard Fruit and Steamship Company, the lawsuit must have been filed in Costa Rica or Ecuador. 7. As to Standard Fruit Company de Costa Rica, S.A., Dole Fresh Fruit International, Inc., and Dole Fresh Fruit International, Ltd., the lawsuit must have been filed in Costa Rica. 8. As to Standard Fruit de Honduras, S.A., the lawsuit must have been filed in Honduras." (Dole Defs.' Agreement at 4.)

While it may be true that the above companies only have operations in the jurisdictions given, this Court has not had the issue properly presented to it. This Court has made no factual findings as to the extent of any Defendant's banana operations or DBCP usage. These matters are properly before the foreign courts. The Court, by holding the foreign jurisdictions to be adequate alternative fora, has already determined that these Courts are capable of determining the existence and extent of liability, if any. Accordingly, the Court SUSTAINS the fifth objection and STRIKES the above quoted material from the agreements of the Dole and Del Monte Defendants.

6. *Personal Jurisdiction*

The Plaintiffs argue that it is unfair that Defendants reserve the right to protest the personal jurisdiction of this Court should the case return to it. This is the third time this issue has been addressed by this Court. (*See* September 9,

1998 Order at 30 n.7.; October 19, 1998 Order at 6-7.) For the reasons set out clearly in its previous orders, the Court has not yet ruled on the issue of personal jurisdiction. "The matter of personal jurisdiction will be heard only if the action should be returned to this Court." (October 19, 1998 Order at 7.)

7. *Compliance with the Court's Orders*

Plaintiffs argue that the Defendants intend to re-litigate compliance with the conditions set forth in the Court's September 9, 1998 Order as amended if Plaintiffs return to enforce a judgment obtained in a foreign jurisdiction. Plaintiffs cite no portion of the Defendants agreements which so reserve such a right. Defendants, in their Reply to the amended objections fail to raise the issue in response. The Court finds that the Defendants have waived the right to raise issues of Plaintiffs' compliance with the September 9, 1998 and October 19, 1998 Orders, should this case return for enforcement of a final judgment in the future.

CONCLUSION

In accordance with the foregoing, IT IS HEREBY ORDERED THAT:

1. The Del Monte Defendants' Agreements Regarding Conditions of Dismissal For Forum Non Conveniens are ACCEPTED IN PART AND REJECTED IN PART. The Court STRIKES the following from the Agreements at Page 3: "4. With respect to the assertion of claims against Del Monte, the lawsuit must have been brought in Costa Rica or Guatemala."

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2. The Dole Defendants' Agreements Regarding Conditions of Dismissal For Forum Non Conveniens are ACCEPTED IN PART AND REJECTED IN PART. The Court STRIKES the following from the Agreements at Page 4: "6. As to Dole Food Company, Inc., Dole Fresh Fruit Company, Standard Fruit Company, and Standard Fruit and Steamship Company, the lawsuit must have been filed in Costa Rica or Ecuador. 7. As to Standard Fruit Company de Costa Rica, S.A., Dole Fresh Fruit International, Inc., and Dole Fresh Fruit International, Ltd., the lawsuit must have been filed in Costa Rica. 8. As to Standard Fruit de Honduras, S.A., the lawsuit must have been filed in Honduras."

3. Amvac Chemical Corporation's Notice of Agreements Satisfying Forum Non Conveniens Conditions is ACCEPTED.

4. Defendant The Dow Chemical Company's Agreements Regarding Conditions of Dismissal For Forum Non Conveniens are ACCEPTED.

5. Defendant Occidental Chemical Corporation's Agreements Regarding Conditions of Dismissal For Forum Non Conveniens are ACCEPTED.

6. Defendant Pineapple Growers Association of Hawaii's Agreements Regarding Conditions of Dismissal For Forum Non Conveniens are ACCEPTED.

7. Shell Oil Company's Notice of Agreements Satisfying Forum Non Conveniens Conditions is ACCEPTED.

8. Defendants Chiquita Brands, Inc., Chiquita Brands International, Inc. and Maritrop Trading Corporation's Response to this Court's September 9, 1998 and October 19, 1998 Orders Establishing Conditions for Dismissal Forum Non Conveniens is ACCEPTED.

9. Plaintiffs' Amended Objections to Defendants' Stipulations and Agreements are DENIED IN PART AND SUSTAINED IN PART.

10. Defendants have complied with the Court's conditions of dismissal imposed in the Court's Orders of September 9, 1998 and October 19, 1998. Accordingly, this action is DISMISSED. The clerk is instructed to close the file.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, March 8, 1999.

s/ Helen Gillmor
HELEN GILLMOR
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII DENYING THIRD PARTY DEFENDANTS DEAD SEA BROMINE CO., LTD. AND BROMINE COMPOUND LIMITED'S MOTION FOR RECONSIDERATION DATED AND FILED NOVEMBER 17, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 97-01516 HG

GERARDO DENNIS PATRICKSON; RODOLFO BERMUDEZ ARIAS; BENIGNO TORRES HERNANDEZ; FERNANDO JIMENEZ ARIAS; SANTOS LEANDROS; HERMAN ROMERO AGUILAR; ELIAS ESPINOZA MERELO HOOKER ERA CELESTINO; ALIRIO MANUEL MENDEZ; and CARLOS HUMBERTO RIVERA, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY; DOLE FRESH FRUIT INTERNATIONAL, LIMITED; DOLE FRESH FRUIT INTERNATIONAL, INC.; PINEAPPLE GROWERS ASSOCIATION OF HAWAII; AMVAC CHEMICAL CORPORATION; SHELL OIL COMPANY; DOW CHEMICAL COMPANY; OCCIDENTAL CHEMICAL CORPORATION (individually and as successor to Occidental Chemical Company and Occidental Chemical Agricultural Products, Inc., Hooker Chemical and Plastics, Occidental Chemical Company of Texas and Best Fertilizer

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Company); STANDARD FRUIT COMPANY; STANDARD FRUIT AND STEAMSHIP COMPANY; STANDARD FRUIT COMPANY de COSTA RICA, S.A.; STANDARD FRUIT COMPANY de HONDURAS, S.A.; CHIQUITA BRANDS, INC.; CHIQUITA BRANDS INTERNATIONAL, INC. (individually and as successor in interest to United Brands Company, Inc.); MARITROP TRADING CORPORATION; DEL MONTE FRESH PRODUCE, N.A.; DEL MONTE FRESH PRODUCE COMPANY; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; and DOE CORPORATIONS 1-10,

Defendants.

DOLE FOOD COMPANY, INC.,

Defendant/Third-Party Plaintiff,

vs.

DEAD SEA BROMINE CO., LTD., and BROMINE COMPOUNDS LIMITED,

Third-Party Defendants.

ORDER DENYING THIRD PARTY DEFENDANTS DEAD SEA BROMINE CO., LTD. AND BROMINE COMPOUNDS LIMITED'S MOTION FOR RECONSIDERATION OF THE COURT'S FSIA RULING FILED HEREIN ON SEPTEMBER 9, 1998

Appendix D

I. INTRODUCTION

Plaintiffs bring this action based on claims that arose out of their alleged exposure to the chemical pesticide dibromochloropropane ("DBCP") while working on farms in Costa Rica, Ecuador, Guatemala, and Panama. Following removal from state court, Plaintiffs filed motions to remand and certain Defendants filed a motion to dismiss. The Court granted a conditional dismissal on forum non conveniens grounds by written Order entered September 9, 1998. In the Order, the Court ruled that the Third-party Defendants Dead Sea Bromine Co., Ltd. and Bromine Compounds Ltd. (Dead Sea Defendants) were not organs of the State of Israel within the meaning of the Foreign Sovereign Immunities Act (FSIA). The matter is now before the Court on the Dead Sea Defendants' Motion for Reconsideration of the Court's FSIA Ruling Filed Herein on September 9, 1998 (Dead Sea Defendants' Motion).

Dead Sea Defendants' Motion requests that the Court reconsider the determination that the Dead Sea Defendants are not organs of the State of Israel under the FSIA. For the reasons set forth below, the Court denies Dead Sea Defendants' Motion.

II. BACKGROUND

On September 9, 1998, the Court entered an Order Denying Plaintiffs' Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction and Denying Plaintiffs' Motion for Remand and in Opposition to the Supplemental Grounds

for Removal and Granting Certain Defendants' Motion to Dismiss and for Injunctive Relief Filed December 24, 1997 and Denying Plaintiffs' Motion to Strike Defendants' Supplemental Affidavits. Dead Sea Defendants' Motion was filed herein on September 21, 1998. Defendant Dow Chemical Company filed a Joinder to Dead Sea Defendants' Motion on September 25, 1998. Plaintiffs filed a Memorandum in Opposition to Dead Sea Defendants' Motion on October 2, 1998. Five Defendants filed statements of no opposition: Occidental Chemical Corp. (October 1, 1998); Chiquita Brands, Inc., Chiquita Brands International, Inc. and Maritrop Trading Corp. (October 1, 1998); and Shell Oil Co. (October 8, 1998). On October 14, 1998, Dead Sea Defendants filed a Reply Memorandum of Law.

III. DISCUSSION

The disposition of a motion for reconsideration is committed to the sound discretion of the district court. *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1441 (9th Cir. 1991). In entertaining such a motion, courts should not lightly disregard the "compelling interest in the finality of judgments[.]" *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983).

It is well settled in the Ninth Circuit that a party seeking reconsideration and reversal of a prior decision of the Court must satisfy two burdens:

> First, a motion for reconsideration must demonstrate some reason why the court should reconsider its prior decision. Second, a motion for reconsideration must set forth facts or law of a

> strongly convincing nature to induce the court to reverse its prior decision. . . . Courts have established only three grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the discovery of new evidence not previously available; and (3) the need to correct clear or manifest error in law or fact, to prevent manifest injustice.

Stein v. State Farm Mut. Auto. Ins. Co., 934 F. Supp. 1171, 1173 (D. Haw. 1996) (citing *Great Hawaiian Financial Corp. v. Aiu*, 116 F.R.D. 612, 616 (D. Haw. 1987), *rev'd on other grounds*, 863 F.2d 617 (9th Cir. 1988)). Local Rule 60.1 reflects this standard governing motions for reconsideration.

Here, Dead Sea has not alleged any facts or additional information that would allow the Court to change its decision. No intervening change in the law is argued and no new evidence has been produced. Dead Sea does argue a manifest error of fact in the September 9, 1998 Order is causing a manifest injustice.

Dead Sea Defendants argue that it is a manifest error of fact to find that the Dead Sea companies are not created by the government of Israel for a government mission or purpose. The term purpose was used in light of *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995) and *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650 (9th Cir. 1996).

This Court held in the September 9, 1998 Order that the Dead Sea Defendants are not "organs" within the meaning

of the FSIA. The statements of Noah Ehrlich were considered by this Court. They express the conclusions of the Dead Sea Defendants and do not require this Court to reach a conclusion different than that expressed at length in the September 9, 1998 Order. The totality of the evidence continues to convince the Court that the Dead Sea Defendants are not "organs" within the meaning of the FSIA. The Court DENIES Dead Sea Defendants' Motion.

IV. CONCLUSION

In accordance with the foregoing, IT IS HEREBY ORDERED that Dead Sea Defendants' Motion Filed September 21, 1998 is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, November 17, 1998.

s/ Helen Gillmor
HELEN GILLMOR
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII DENYING PLAINTIFFS' MOTION FOR REMAND, ETC. DATED AND FILED SEPTEMBER 9, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 97-01516 HG

GERARDO DENNIS PATRICKSON; RODOLFO BERMUDEZ ARIAS; BENIGNO TORRES HERNANDEZ; FERNANDO JIMENEZ ARIAS; SANTOS LEANDROS; HERMAN ROMERO AGUILAR; ELIAS ESPINOZA MERELO HOOKER ERA CELESTINO; ALIRIO MANUEL MENDEZ; and CARLOS HUMBERTO RIVERA, individually and on behalf of others similarly situated,

Plaintiffs,

vs.

DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY; DOLE FRESH FRUIT INTERNATIONAL, LIMITED; DOLE FRESH FRUIT INTERNATIONAL, INC.; PINEAPPLE GROWERS ASSOCIATION OF HAWAII; AMVAC CHEMICAL CORPORATION; SHELL OIL COMPANY; DOW CHEMICAL COMPANY; OCCIDENTAL CHEMICAL CORPORATION (individually and as successor to Occidental Chemical Company and Occidental Chemical Agricultural Products, Inc., Hooker Chemical and Plastics, Occidental Chemical Company of Texas and Best Fertilizer Company); STANDARD FRUIT COMPANY; STANDARD FRUIT AND STEAMSHIP COMPANY; STANDARD

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FRUIT COMPANY de COSTA RICA, S.A.; STANDARD FRUIT COMPANY de HONDURAS, S.A.; CHIQUITA BRANDS, INC.; CHIQUITA BRANDS INTERNATIONAL, INC. (individually and as successor in interest to United Brands Company, Inc.); MARITROP TRADING CORPORATION; DEL MONTE FRESH PRODUCE, N.A.; DEL MONTE FRESH PRODUCE COMPANY; DEL MONTE FRESH PRODUCE HAWAII INC.; DEL MONTE FRESH PRODUCE COMPANY AND FRESH DEL MONTE N.V.; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; and DOE CORPORATIONS 1-10,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR REMAND AND IN OPPOSITION TO THE DEAD SEA DEFENDANTS' ASSERTION OF FOREIGN SOVEREIGN IMMUNITIES ACT JURISDICTION

and

DENYING PLAINTIFFS' MOTION FOR REMAND AND IN OPPOSITION TO THE SUPPLEMENTAL GROUNDS FOR REMOVAL

and

GRANTING CERTAIN DEFENDANTS' MOTION TO DISMISS AND FOR INJUNCTIVE RELIEF FILED DECEMBER 24, 1997

and

DENYING PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' SUPPLEMENTAL AFFIDAVITS

Plaintiffs bring this action based on claims that arose out of their alleged exposure to the chemical pesticide dibromochloropropane ("DBCP") while working on farms

in Costa Rica, Ecuador, Guatemala, and Panama. Following removal from state court, Plaintiffs filed motions to remand and certain Defendants filed a motion to dismiss. This action is currently before the Court on 1) Plaintiffs' Motion for Remand and In Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction; 2) Plaintiffs' Motion for Remand and In Opposition to the Supplemental Grounds for Removal; and 3) Certain Defendants' Motion to Dismiss and for Injunctive Relief filed December 24, 1997. For the reasons set forth below, the Court finds 1) that removal under the Foreign Sovereign Immunities Act was not proper; 2) removal under the supplemental grounds for removal was proper; 3) the action should be dismissed on forum non conveniens grounds; and 4) no injunction will issue prohibiting the filing of further suits relating to the issues in this action.

I. BACKGROUND

On October 3, 1997, Plaintiffs commenced this action by filing a complaint in the Circuit Court of the First Circuit of the State of Hawaii. Plaintiffs' complaint, as amended and set forth in the Amended Complaint filed March 3, 1998, was filed by nine foreign plaintiffs who are residents of the countries of Costa Rica, Ecuador, Guatemala, and Panama. Plaintiffs bring this action as a class action on behalf of themselves and others similarly situated. Defendants in this action consist of 20 corporations, some of which have principal places of business outside of the United States.

Plaintiffs allege that as a result of their exposure to DBCP, they have suffered serious and permanent injuries.

They claim that Defendants are liable under various causes of action for manufacturing, selling, distributing, supplying and designing DBCP products. Specifically, Plaintiffs set forth claims of 1) negligence; 2) conspiracy; 3) strict liability; 4) intentional tort; 5) breach of implied warranty; 6) compensatory damages; and 7) punitive damages.

On October 31, 1997, Defendant Dole Food Company, Inc. filed a third-party complaint in the action naming Dead Sea Bromine Co., Ltd. ("Dead Sea") and Bromine Compounds Limited ("BCL") (collectively, the "Dead Sea Defendants") as third-party defendants.

On October 31, 1997, the Dead Sea Defendants removed the action to this Court by timely filing a Notice of Removal. Removal was made under 28 U.S.C. § 1441(d) which allows for removal by an entity covered by the Foreign Sovereignty Immunities Act ("FSIA"), 28 U.S.C. § 1602-1611.

On November 3, 1997, Defendant Dole Food Company, Inc. timely filed a Supplemental Notice of Removal which was consented to by all of the other defendants. The Supplemental Notice of Removal states that federal question jurisdiction and diversity jurisdiction provide supplemental bases for subject matter jurisdiction.

On December 2, 1997, Plaintiffs filed a Motion for Remand and in Opposition to the Supplemental Grounds for Removal and on December 3, 1997, Plaintiffs filed a Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction. On March 19, 1998, Defendants filed an Opposition to

Plaintiffs' motions to remand. On March 26, 1998, Plaintiffs filed a reply. On March 19, 1998, the Dead Sea Defendants filed an opposition to Plaintiffs' Motion for Remand. On March 25, 1998, Plaintiffs filed a reply.

On December 24, 1997, all of the Defendants in the action at the time, with the exception of Defendant AMVAC Chemical Corporation, filed a Motion to Dismiss and for Injunctive Relief. On March 19, 1998, the Dead Sea Defendants filed a statement of consent in connection with the motion to dismiss and for injunctive relief. Plaintiffs filed a response to Defendants' motion on March 18, 1998. On March 26, 1998, Defendants filed a reply. On April 3, 1998, Plaintiffs filed a motion to strike certain supplemental affidavits attached to Defendants' reply. A hearing on Plaintiffs' motions for remand and motion to strike and on Defendants' motion to dismiss and for injunctive relief was held on April 6, 1998.

II. PLAINTIFFS' MOTION FOR REMAND AND IN OPPOSITION TO FOREIGN SOVEREIGNTY IMMUNITIES ACT JURISDICTION

A. *Standard of Review*

Where a case is removed to federal court there is a strong presumption against federal court jurisdiction. *Gaus v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992) (citing *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 712 n.3 (9th Cir. 1990)). The defendant, who is the removing party, bears the burden of proving the propriety of removal, including jurisdiction. *Id.*; *Nishimoto*, 903 F.2d at 712 n.3; *Trenton v.*

Infinity Broadcasting Corp., 865 F. Supp. 1416, 1421 (C.D. Cal. 1994). The Ninth Circuit strictly construes the removal statute against removal jurisdiction. *Gaus*, 980 F.2d at 566; *Dunn v. Pepsi-Cola Metropolitan Bottling Co., Inc.*, 850 F. Supp. 853, 855 (N.D. Cal. 1994). Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance. *Id.* In determining whether they should remand a removed civil action due to lack of subject matter jurisdiction, courts should resolve any doubt in favor of remand. 28 U.S.C.A. §§ 1441(a), 1447(c). *See St. Francis Hosp. and Med. Ctr. v. Blue Cross & Blue Shield of Connecticut, Inc.*, 776 F. Supp. 659, 661 (D. Conn. 1991).

B. *Foreign State Status Under the FSIA*

The Dead Sea Defendants removed Plaintiffs' Complaint pursuant to 28 U.S.C. § 1441(d) which provides that "[a]ny civil action brought in a State court against a foreign state as defined in section 1603(a) . . . may be removed by the foreign state[.]" 28 U.S.C. § 1441(d). The issue now before the Court is whether the Dead Sea Defendants qualify as foreign states under 28 U.S.C. § 1603(a). The definition of a foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a). The parties do not contend that Dead Sea and BCL acted as political subdivisions of Israel, therefore, the court must decide whether the Dead Sea Defendants are agencies or instrumentalities of Israel as defined in 28 U.S.C. § 1603(b).

The FSIA defines "agency or instrumentality" as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state . . ., and
>
> (3) which is neither a citizen of a State of the United States . . ., nor created under the laws of any third country.

28 U.S.C. § 1603(b). In the instant case, there is no dispute that Defendants satisfy the first and third requirements for agency or instrumentality status; the parties only dispute whether the second requirement is satisfied.

Defendants contend that Dead Sea and BCL are agencies and instrumentalities of Israel. They assert that they are organs of the State of Israel and that the State of Israel, at all relevant times, held a majority ownership interest in both Dead Sea and BCL. Plaintiffs argue that the Dead Sea Defendants are not organs of Israel and that the State of Israel does not directly own a majority of shares of either Dead Sea Defendant.

Plaintiffs and Defendants also disagree as to what time period is relevant to making the determination of foreign state status. Defendants argue that the relevant period is the period of the alleged wrongdoing. Plaintiffs disagree, and urge the Court to look to the date upon which the complaint was filed, October 3, 1997.

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1. *Relevant Time Period for Determining Foreign Sovereign Status*

At the time the suit was filed, Israel was only a minority shareholder of the Dead Sea Defendants. (Dead Sea Defendants' Notice of Removal, at ¶ 4(d); Declaration of Motti Levin, ¶ 5, attached as Exh. 5 to Plaintiffs' Motion for Remand and In Opp. to Dead Sea Defendants' Assertion of FSIA Jurisdiction.) Defendants contend that this does not affect removal under 28 U.S.C. § 1441(d) because foreign sovereign status at the time of the alleged wrongdoing is sufficient for removal of the action.

The issue of whether the FSIA applies when foreign sovereign status which existed at the time of the alleged wrongdoing is subsequently lost has been addressed by two circuits. In *Gould, Inc. v. Pechiney Uqine Kuhlmann*, 853 F.2d 445, 447 (6th Cir. 1988), a defendant which was majority-owned by France at the time of the alleged wrongdoing moved to dismiss the complaint on the basis of lack of subject matter jurisdiction under the FSIA. During the pendency of an interlocutory appeal, that defendant's corporation's shares were sold to a private entity. *Id.* at 449. On appeal, the plaintiff contended that because France was no longer a majority owner of the defendant, the defendant could not qualify as a foreign state and would not be immune with respect to its conduct after the change of ownership. *Id.* The Sixth Circuit rejected the plaintiff's argument, stating, "[a]s to completed acts upon which the complaint is based, the parties are bound by the jurisdictional facts existing at the time of those acts." *Id.* at 450. The court found that determination of whether a party is subject to the court's

jurisdiction under the FSIA should be based upon a party's status at the time the act complained of occurred. *Id.*

In *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993), the plaintiffs filed suit against Air Canada and other defendants claiming that they conspired to suppress information about a plaintiff's financial status. *Id.* at 1379. Air Canada moved to dismiss on the basis that at the time of the alleged wrongdoing, it qualified as a foreign state under the FSIA. *Id.* Rejecting the plaintiff's arguments that the FSIA did not apply because Air Canada was no longer foreign owned at the time suit was filed, the district court found that Air Canada was entitled to immunity under the FSIA and granted the motion to dismiss. *Id.* The Eighth Circuit affirmed, holding that FSIA immunity applies to an entity which qualified as a "foreign state" at the time of the alleged wrongdoing but not at the time the suit was filed. *Id.* 1380-82. In coming to its conclusion, the court rejected the same argument that Plaintiffs in this action make regarding the use of the present tense in the FSIA. *Id.* at 1381. The court found that use of the present tense in the FSIA did not mean that immunity under the FSIA exists only if an entity is a foreign state at the time suit is brought. *Id.* The court reasoned that "[t]he doctrine of foreign state sovereign immunity was 'created to effectuate general notions of comity among nations.' . . . [t]he foreign policy concerns discouraging us from judging the acts of another nation are not necessarily eliminated because an entity is not a foreign state at the time of suit." *Id.* (citations omitted).

This Court finds the reasoning of the Sixth and Eighth Circuits to be persuasive. The FSIA sets forth the general

rule that foreign states are immune from the jurisdiction of federal and state courts. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir. 1992). The suit is premised on facts that existed at the time of the alleged wrongdoing. *See Gould*, 853 F.2d at 450. The absence of foreign state status at the time the suit was filed does not negate the foreign policy concerns underlying the doctrine of sovereign immunity. *Grossman*, 991 F.2d at 1382.

Plaintiffs point to two Ninth Circuit decisions, *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (9th Cir. 1984) and *Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994) to support their contention that foreign status must be determined at the time the suit is filed. Both cases establish that FSIA immunity can apply to entities that became entitled to foreign sovereign protection after the alleged wrongdoing. *Wolf*, 739 F.2d at 1460; *Straub*, 38 F.3d at 451. Neither case, however, addresses the issue before the Court of whether the FSIA applies when foreign sovereign status which existed at the time of the alleged wrongdoing is subsequently lost.

Based on the foregoing, the Court finds that the Dead Sea Defendants can be entitled to FSIA foreign state status if it is determined that they met the FSIA foreign state requirements at the time the alleged wrongdoing occurred.

2. *Majority Ownership by the State of Israel*

Defendants contend that Dead Sea and BCL qualify as agencies or instrumentalities of the State of Israel because the State of Israel held a majority ownership interest in both Dead Sea and BCL. During the time period in question,

the State of Israel did not directly own either Dead Sea or BCL. At all relevant times, the chain of ownership between the State of Israel and the Dead Sea Defendants included intermediary corporations. (See Appendix to Memo. of Law of Third Party Defendants Dead Sea Bromine Co., Ltd. and Bromine Compounds Limited in Opposition to Plaintiff's Motion to Remand ("Dead Sea Appendix"), Exh. B.) For example, from 1970 to 1975, the State of Israel owned 99% of an entity named Dead Sea Works which in turn owned 99.9% of Dead Sea. Dead Sea owned 50% of BCL and Dead Sea Works owned 25% of BCL. (Dead Sea Appendix, Exh. B.) After 1975, another entity was added to the chain of ownership when the State of Israel conveyed its ownership of Dead Sea Works to Israel Chemicals Ltd., an Israeli corporation wholly owned by the State of Israel. (Decl. of Noah Ehrlich dated December 18, 1997, at ¶ 12, at Dead Sea Appendix A.) Any ownership interest of Dead Sea and BCL claimed by the State of Israel was completely indirect at all relevant times.

The Court must determine if the indirect ownership is sufficient to meet the requirements of § 1603(b). The specific issue is whether indirect ownership through a subsidiary entitles an entity to be considered an agency or instrumentality of a foreign state.

Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir. 1995), is the most recent Ninth Circuit decision which discusses the requirements of agency or instrumentality status. While the case is not entirely on point, it is deserving of a lengthy examination.

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In *Gates*, the plaintiffs were employees who were terminated when their employer closed its business. *Gates*, 54 F.3d at 1459. They brought an action against several companies including Fletcher's Fresh Food ("FFF"), their employer's parent company, and Alberta Pork Products, FFF's parent company. *Id.* Alberta Pork and FFF moved to dismiss for lack of subject matter jurisdiction pursuant to the FSIA. *Id.* The district court assumed that Alberta Pork and FFF were foreign states under the FSIA, and denied the motion to dismiss upon concluding that FFF and Alberta Pork were not immune from the court's jurisdiction because their actions fell under the commercial activity exception to FSIA immunity. *Id.* Alberta Pork and FFF appealed. *Id.*

On appeal, the Ninth Circuit addressed whether Alberta Pork and FFF qualified as foreign states under § 1603(b)(2). *Id.* at 1459-60. Noting that the legislative history of the FSIA suggests that "Congress intended the terms "organ" and "agency or instrumentality" to be read broadly[,]" the court concluded that Alberta Pork was an agency or instrumentality of the Province of Alberta by virtue of it being an organ of a foreign state. *Id.* at 1460-61.

The Ninth Circuit then considered the status of FFF under § 1603(b)(2). It noted that FFF, "an ordinary pork processing plant, [could not] be considered an 'organ' of the Province of Alberta[,]" so it looked to see if a majority of the shares of FFF were owned by a foreign state. *Id.* at 1461-62. It concluded that because FFF was wholly owned by Alberta Pork, an organ of the Province of Alberta, a majority of FFF shares were not owned by a foreign state as is required by the statute. *Id.* at 1462. The court went on to say,

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> As it is written, the Act provides potential immunity to entities that are either organs of a foreign state or political subdivision thereof or have a majority of shares owned by the foreign state or political subdivision. To add to that list entities that are owned by an agency or instrumentality would expand the potential immunity considerably because it would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as the first corporation is an organ of the foreign state . . . or has a majority of its shares owned by the foreign state[.]" *Id.*

The court concluded that FFF did not have status as an agency or instrumentality because it was not an organ of a foreign state nor was it majority-owned by a foreign state. *Id.* at 1462-63.

In a later decision, *Corporacion Mexicana de Servicios Maritimos S.A. de C.V. v. M/T Respect*, 89 F.3d 650 (9th Cir. 1996), the Ninth Circuit reiterated its findings in *Gates*. The court stated that "the ownership test of § 1603(b)(2) applie[s] only to the first tier of ownership: an entity wholly owned by 'an agency or instrumentality of a foreign state' is not owned by a 'foreign state or a political subdivision thereof' and therefore does not meet the definition of § 1603(b)(2)." *Corporacion Mexicana*, 89 F.3d at 655 (citation omitted).

The facts in the instant case differ from those in *Gates* as this Court is not confronted with a subsidiary of an organ of a foreign state claiming foreign state status. The issue here

is indirect ownership by the State of Israel through a corporate chain. *Gates* and *Corporacion Mexicana* nevertheless provide substantial guidance.

In *Gates*, the Ninth Circuit sought to limit the potential immunity offered to foreign states to those agencies or instrumentalities that have a direct relationship with the foreign state. *Gates*, 54 F.3d at 1462. It pointed out that Congress "could easily have stated that an entity must be owned by a foreign state, a political subdivision or an agency or instrumentality of a foreign state or political subdivision[,]" but did not. *Id.* The Ninth Circuit was careful not to put "words in Congress' mouth" and found that a contrary reading of the statute could expand immunity far beyond what Congress intended. *Id.*

The language in *Gates* clearly encompasses both organ and majority shareholder status. *See Gates*, 54 F.3d at 1462. The Ninth Circuit indicated that including entities that are owned by an agency or instrumentality would expand potential immunity considerably because it would provide immunity to every subsidiary in a corporate chain, "so long as the first corporation is an organ of the foreign state . . . *or has a majority of its shares owned by the foreign state*" *Id.* (emphasis added) (footnote omitted). Additionally, the Ninth Circuit's reference in *Corporacion Mexicana* that the ownership test of § 1603(b)(2) applies only to the first tier of ownership is compelling. *Corporacion Mexicana*, 89 F.3d at 655. Had the Ninth Circuit intended to limit the ownership test of § 1603(b)(2) to organ situations, it would have specifically limited its holdings.

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The Seventh Circuit, in *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932 (7th Cir. 1996), however, did address the issue now before this Court, and found the Ninth Circuit's opinion in *Gates* unpersuasive. The plaintiffs in that case sued the airline, American Eagle, its parent company AMR and Avions de Transport Regional, G.I.E. ("ATR"), the aircraft manufacturer, for wrongful death as a result of the crash of American Eagle Flight 4184. *Id.* at 935. ATR was indirectly owned by the French and Italian governments through two European commercial aerospace companies. *Id.* The shares of the French parent company, SNIA, were 62.16% owned directly by the French government. *Id.* Alenia, the Italian parent company, was 62.14% owned by the Italian Instituto Per La Reconstruzione Indusriale ("IRI"). IRI was a holding company wholly owned by the Italian government. *Id.* at 936. Through these intermediaries, France and Italy retained nearly 75% of ATR. *Id.*

The Seventh Circuit disagreed with the Ninth Circuit's discussion of § 1603(b)(2) in *Gates*, and found that "[a]lthough France and Italy controlled ATR through intervening entities, the language and legislative history consistent with the language of the FSIA demonstrate that ATR is the type of corporation included within the statutory definition of foreign state." *Id.* at 941 (internal quotations omitted). In *Gates*, the Ninth Circuit found that the use of the word "includes" in 28 U.S.C. § 1603(a) limits the definition of "foreign state". *Gates*, 54 F.3d at 1462. It stated, "the statute provides that a foreign state includes an agency or instrumentality, not that it is an agency or instrumentality or that it is defined as an agency or instrumentality." *Id.* The Seventh Circuit, however, found that the use of the word

"includes" shows Congress' intent to broadly define "foreign state." *Air Crash*, 96 F.3d at 940. The Seventh Circuit reasoned that the entirety of the FSIA indicates that "if a foreign state as defined in § 1603(a) includes an agency or instrumentality of a foreign state, then a corporation that is majority-owned by a foreign state includes a corporation majority owned by an agency or instrumentality of a foreign state." *Id.* (citation and internal quotations omitted.) This decision directly contradicts the Ninth Circuit's reasoning and holding in *Gates*.

In *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 688 (S.D.N.Y. 1996), the court discussed both the Ninth and Seventh Circuit's interpretation of § 1603(b)(2), and found that "[n]either the Ninth nor the Seventh Circuits' attempt to explain away the inconsistency [in the section] is dispositive." The court averred that Congress' intentions must be inferred from other sources and not from the language of the text. *Id.* The court discussed the fact that Congress rejected in the FSIA the "separate entity rule" for foreign corporations owned by foreign states which is the prevailing international rule. *Id.* The separate entity rule presumes that entities with separate legal personalities do not have sovereign status. *Id.* The FSIA reversed this presumption and Congress expressly gave corporations owned by foreign states immunity, subject to the commercial activity exception. *Id.* The court reasoned that because Congress was unambiguous in its departure from the prevailing international rule, and because of the serious consequences of a further extension of the FSIA to include corporations owned by agencies and instrumentalities, Congress would have been just as explicit in stating its intention that such entities fall under the FSIA if it so

intended. *Id.* at 689-90. The court found that a corporation whose shares are owned by an agency or instrumentality of a foreign state is not a foreign state under the FSIA. *Id.* at 690.

While there are cases in the Ninth Circuit where the court has allowed a corporation that is indirectly owned by a foreign state to maintain foreign state status, there was no reference to the issue now before this Court. In fact, the cases came to the court with a presumption of foreign state status, and the court was requested to decide other issues. *See America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989); *Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994). Furthermore, each of these cases was decided prior to the Ninth Circuit's decision in *Gates*.

Based on the foregoing, the Court finds that Israel's indirect ownership of Dead Sea and BCL through several intermediary corporations does not qualify Dead Sea and BCL as agencies or instrumentalities of a foreign state pursuant to 28 U.S.C. § 1603(b)(2). Dead Sea and BCL are not entities whose majority of shares or other ownership interest are owned by a foreign state.

3. *Organs of the State of Israel*

Dead Sea and BCL also argue that they have foreign state status because they are organs of the State of Israel. They allege that courts look to two categories when deciding organ status: "(i) whether the entity advanced the interests of the foreign sovereign; and (ii) whether the foreign sovereign supervised and/or exercised control over the entity so as to circumscribe the entity's ability to act independently."

(Dead Sea and BCL's Opp. at 18.) They contend that their relationship with the State of Israel encompasses both of these factors.

As mentioned earlier, in *Gates* the Ninth Circuit determined that Alberta Pork, the parent corporation, was an organ of the Province of Alberta. Alberta Pork was a Canadian corporation established pursuant to the Alberta Marketing of Agricultural Products Act to provide for the effective marketing and promotion of hogs produced in the Province of Alberta. *Gates*, 54 F.3d at 1459. Alberta Pork served as the sole marketing agent through which hogs raised in Alberta were sold. *Id.* Hog producers were required to sell their hogs to Alberta Pork which in turn sold the hogs to pork producers and remitted the proceeds to the producers. *Id.*

The Ninth Circuit determined that Alberta Pork was an organ not by applying a rigid test, but by analyzing the characteristics of the relationship between Alberta Pork and the Province of Alberta. Under Alberta law, producers of an agricultural product could apply to the Alberta Agricultural Products Marketing Council ("Council") for approval to establish a marketing board. *Gates*, 54 F.3d at 1460. The hog producers in Alberta submitted a plan to the Council to create a marketing board for their industry. *Id.* It was approved, and Alberta Pork was formed. *Id.*

The Council did not exercise day-to-day control over the marketing boards like Alberta Pork, but it played a supervisory role. *Id.* Once a marketing board was established, it could "act only in a manner and on the subjects that the Council has previously authorized." *Id.* at 1461. For example,

when Alberta Pork wanted to buy FFF, the Council had to issue a regulation approving the acquisition. *Id.*

The Council could also require a board to provide it with all of its records, ask a board to amend or repeal its regulations, and amend or repeal the board s regulations itself if the board had not done so within 45 days. *Id.* A board could not issue regulations without the approval of the Council, and if the regulations conflicted with the Council's regulations, the Council's regulations prevailed. *Id.* If a producer was not satisfied with a decision of a board, it could appeal to an appellate body appointed by the Minister.[1] *Id.* Furthermore, the members of a board were granted immunity for their acts performed while carrying out their duties of the board.[2] *Id.* The court concluded that because Alberta Pork advanced the interest of the Province of Alberta in marketing hogs, and because the laws and regulations of the Province narrowly circumscribed Alberta Pork's ability to act independently, Alberta Pork squarely fit within the definition of an organ. *Id.*

In *Corporacion Mexicana*, the Ninth Circuit found that Pemex-Refining was an organ of the government of Mexico. *Corporacion Mexicana*, 89 F.3d at 655. Pemex-Refining was created by a presidential decree to restructure Pemex-Refining's parent company. *Id.* at 654. Pemex-Refining was responsible for the refining, manufacturing, and distributing of petroleum based products in Mexico. *Id.*

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1. The court found this significant, and stated that based on this characteristic a board resembled an administrative agency. *Id.*

2. The court noted that immunity was normally only "afforded to government actors." *Id.*

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In finding that Pemex-Refining was an organ of the government of Mexico, the. Ninth circuit relied on the district court's analysis which explained that Pemex-Refining:

> is an integral part of the United Mexican States. Pemex[-Refining] was created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation; it is entirely owned by the Mexican Government; is controlled entirely by government appointees; employs only public servants; and is charged with the exclusive responsibility of refining and distributing Mexican government property. Thus Pemex[-Refining] is a subdivision of the United Mexican States and therefore qualifies for foreign sovereign immunity under FSIA.

Id. at 655. The court reasoned that compared to Alberta Pork, Pemex-Refining "is much more of an 'organ' of the government of Mexico than Alberta Pork is of the province of Alberta." *Id.*

The Ninth Circuit has not provided a clear test to determine organ status, but its decisions indicate characteristics that make an entity an organ. Characteristics that supported the Ninth Circuit's finding of organ status in both *Gates* and *Corporacion Mexicana* include: (1) the entity was created by the government; (2) the entity served an important government purpose; (3) the entity represented the interests of the government; (4) the entity was charged with exclusive responsibility;[3] (5) the government exercised a

3. In *Gates*, Alberta Pork was the only pork board, and in *Corporacion Mexicana*, Pemex-Refining was the only body that refined and distributed Mexican petroleum resources.

supervisory role over the entity; and (6) that the entity's ability to act independently was circumscribed by the government. The court also looked at whether the entity employed only government employees, whether the entity acted as an administrative agency, and whether the employees were granted governmental immunity. Not all of these factors need to be present to maintain organ status, however, the entity should at least appear to act in concert with the foreign government at some level.[4]

Defendants support their argument that Dead Sea and BCL maintain organ status by providing the court with substantial information regarding Dead Sea's and BCL's relationship with the State of Israel. Defendants argue that

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4. In *Intercontinental Dictionary Series v. De Gruyter*, 822 F. Supp. 662, 673 (C.D. Cal. 1993), the district court discussed the organ status of Australian National University and focused on the fact that the University furthered the academic interests of national importance, that salaries of its employees were paid by the Australian government, that the University submitted annual reports regarding funding to the Australian government, and that the University was treated like an agency in other Australian legislation. In *Supra Medical Corp. v. McGonigle*, 955 F. Supp. 374, 379 (E.D. Penn. 1997), the district court, citing *Corporacion Mexicana*, indicated that to determine organ status a court should consider "(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the country; and (5) how the entity is treated under foreign state law." These cases demonstrate that a hard and fast rule is not applied. Instead the court looks at the relationship between the entity and the foreign government and determines on an ad hoc basis whether the relationship is sufficient to find organ status.

they advanced vital national interests of the State of Israel because they developed and commercially exploited Israel's natural resources. The minerals extracted from the Dead Sea by Defendants were owned by the State of Israel. (Dead Sea Appendix, Exh. E at E001.) Defendants show that they operated under an exclusive statutory concession and subconcession granted by the Israeli legislature to mine the Dead Sea and to market and sell the minerals and their compounds. (Dead Sea Appendix, Exh. E, § 2 and Exh. F, § 2.) The State of Israel was paid a royalty for the extracted minerals. (Dead Sea Appendix, Exh. E., § 15 and Exh. F., § 17.) The Dead Sea Defendants contend that the "economic exploitation of these natural resources is vital to the national interests of the State of Israel[.]" (Dead Sea and BCL Opp., at 19.)

Defendants argue that the exploitation of the State's natural resources is analogous to the activities of Pemex-Refining, the entity discussed in *Corporacion Mexicana*. As discussed above, Pemex-Refining was an entity created by the Mexican government for the specific purpose of refining and distributing oil and gas. *Corporacion Mexicana*, 89 F.3d at 655. While the activity may be similar, the position that Pemex-Refining held in relation to the Mexican government was much closer than the position that Dead Sea and BCL hold in relation to the State of Israel. Dead Sea and BCL are not controlled entirely by government appointees (Dead Sea Appendix., Exh. G, §§ 37, 48), do not employ only public servants (Ehrlich Depo., at 125:21-25 at Dead Sea Appendix, Exh. TT), and are not entirely owned by the State of Israel (Dead Sea Appendix., Exh. A, §§ 9-16.)

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Defendants also contend that the State of Israel controlled, regulated and supervised Dead Sea and BCL's activities. They explain that the ability of the State to control Defendants was derived from three sources. First, they point out that the State's indirect ownership of the companies provided Israel with the ability to control the Articles of Association, boards of directors and officers of each corporation. (Dead Sea Appendix, Exhs. C and D).

Second, they indicate that the concession and subconcession enactments provided Israel with various rights, including the right to terminate the concession. (Dead Sea Appendix, Exh. E, § 23(b)). The Dead Sea Defendants contend that this right provided control as "[t]ermination of the concession would deprive [Dead Sea and BCL] of their essential raw materials and thus devastate their business purposes, objective and affairs." (Dead Sea Opp., at 22.)

The Dead Sea Defendants also identify the Israeli Government Companies Law as a source of Israel's control over the entities. Dead Sea and BCL were purportedly subject to the Government Companies Law because they were indirectly owned by the State of Israel. (Dead Sea Opp., at 22.) Under the Government Companies Law, their operations and management were subject to different forms of government control, including the right to approve or disapprove certain decisions made by a government company's Board of Directors. (Dead Sea Appendix, Exh. G, § 11.)

The Dead Sea Defendants contend that the State of Israel regularly exercised these powers. For example,

the government regularly appointed government employees to serve on the Boards of Directors of Dead Sea and BCL. (Dead Sea Appendix, Exh. H.) The government appointed other government employees to observe meetings held by the Boards of Directors and its committees. (Dead Sea Appendix, Exh. K.) The government required that the companies freeze salaries and wages. (Dead Sea Appendix, Exh. W.) Based upon this information, Defendants contend that throughout the relevant period, Dead Sea and BCL were organs of the State of Israel within the meaning of the FSIA.

The Court does not dispute that the Dead Sea Defendants and the State of Israel maintained a significant relationship. The Court, however, is not convinced that their relationship with the State of Israel is sufficient to raise them to the status of organs of a foreign state.

Dead Sea and BCL are commercial mining operations concerned with production, marketing and profit. (Dead Sea Appendix, Exh. A, Ehrlich Decl., at ¶ 7-8.) The control maintained by the government was derived mainly from the government's indirect ownership of the entities. Any other entity in which the government owned a majority interest would be subject to the same control. (*See* Dead Sea Appendix, Exh G.) Unlike the situations in *Gates* and *Corporacion Mexicana*, the government's control is not derived from the need to play an active supervisory role over a government created entity. *See Gates*, 54 F.3d at 1460-61; *Corporacion Mexicana*, 89 F.3d at 655. Moreover, the entities are not staffed solely with government employees (Dead Sea Appendix, Exh. TT, Ehrlich Depo. at 125:21-25) and are not treated as agencies under Israeli law.

The Court finds that unlike Alberta Pork and Pemex-Refining, Defendants were independent corporations pursuing a purpose that benefitted the government of Israel, but were not created by the government to fulfill a government mission. Consequently, Dead Sea and BCL are not organs of the State of Israel, and cannot be granted foreign state status under the FSIA.

Based on the foregoing, the Court finds that neither Dead Sea nor BCL qualify as an agency or instrumentality of a foreign state under the FSIA. Removal of the action by the Dead Sea Defendants under 28 U.S.C. § 1441(d) was therefore not proper.[5] There is, however, the Supplemental Grounds for Removal filed by Defendant Dole Food Company which may provide grounds for removal. Resolution of Plaintiffs' motion to remand will therefore depend on whether the supplemental grounds of removal were proper.

III. PLAINTIFFS' MOTION FOR REMAND AND IN OPPOSITION TO SUPPLEMENTAL GROUNDS FOR REMOVAL

On November 3, 1997, Defendant Dole Food Company, Inc. filed a timely Supplemental Notice of Removal which was consented to by the other defendants. The Supplemental Notice of Removal asserts that federal question jurisdiction and diversity jurisdiction provide supplemental bases for removal.

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5. Because the Court finds that neither Dead Sea nor BCL are foreign states under the FSIA and could therefore not remove the action under 28 U.S.C. § 1441(d), it is not necessary to reach Plaintiffs' argument that Dead Sea and BCL were fraudulently joined in the action.

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Defendants assert that the following sources of federal question jurisdiction exist: 1) foreign relations implications; 2) Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et. seq.* ("FIFRA") preemption; and 3) violation of a federal court injunction. In addition, Defendants contend that the question of dismissal based on forum non conveniens and comity of the nations grounds is a uniquely federal determination that must be addressed by a federal court.

Defendants assert that diversity jurisdiction is also present. They allege that all plaintiffs are citizens or subjects of a foreign state and that all defendants over whom the court has personal jurisdiction are citizens of a state of the United States.

As discussed below, the Court finds that removal of the action was proper. Federal question jurisdiction exists because Plaintiffs' action implicates foreign relations. Accordingly, the Court need not reach whether removal was proper under any of the other alleged grounds for removal.

A. *Federal Question Jurisdiction Through Foreign Relations Implications*

In its Supplemental Notice of Removal, Defendant Dole Food Company, Inc. asserts that federal question jurisdiction exists in the present action because Plaintiffs' allegations and requests for relief implicate foreign relations between the United States and the home countries of the Plaintiffs. Plaintiffs contend that their purely state law claims do not implicate United States foreign relations so as to create federal question jurisdiction.

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In evaluating whether the Court has jurisdiction to hear the instant action, the Court must examine the "well-pleaded complaint" to see whether the complaint relies on any doctrine of federal law. *Republic of the Philippines v. Marcos*, 806 F.2d 344, 352, 354 (2nd Cir. 1986). As established by the Supreme Court, lower federal courts have "jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 27-28 (1983). The Court must therefore examine Plaintiffs' complaint to see if the action arises under federal law.

The federal courts have fashioned a federal common law to address issues of international relations. *Aquafaith Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 808 (5th Cir. 1992). In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964), the Supreme Court stated that issues involving "our relationships with other members of the international community must be treated exclusively as an aspect of federal law." Accordingly, federal jurisdiction exists even though a plaintiff pleads only state law causes of action where resolution of the plaintiff's claims require determinations that will directly and significantly affect United States foreign relations. *Marcos*, 806 F.2d at 354.

In *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997), the Fifth Circuit found the plaintiffs' state law causes of action implicated foreign relations sufficiently

to raise substantial questions of federal common law. *Id.* at 542-43. In *Torres*, Peruvian plaintiffs asserted only state law causes of action in Texas state court for injuries caused by sulfur dioxide emissions from the defendants' copper smelting and refining operations in Peru. *Id.* at 541. The defendants removed the action to federal court and the plaintiffs moved to remand. *Id.* at 541-42. The Fifth Circuit found that the district court had federal question jurisdiction to hear the action as the plaintiffs' complaint implicated important foreign policy concerns. *Id.* at 542-43. The action involved injuries to foreign citizens on foreign soil. *Id.* at 541. The case concerned the mining industry of Peru which constituted a significant portion of Peru's export income. *Id.* at 543. The Peruvian government had protested the lawsuit. *Id.* at 542.

As in *Torres*, the instant action implicates foreign policy concerns. Plaintiffs' injuries allegedly arose out of their exposure to DBCP used in the agricultural industry in Plaintiffs' home countries. (Amended Complaint, at ¶¶ 34 & 36.) Plaintiffs were allegedly exposed to DBCP while working in the commercial cultivation of bananas for sale by American corporations in the United States. (Amended Complaint, at ¶ 34.) The action involves injuries to foreign citizens on foreign soil. (Amended Complaint, at ¶ 34). Although the United States had banned use of DBCP in 1979, Defendants allegedly continued to export the product. (Amended Complaint, at ¶ 45.) Plaintiffs claim that defendants who supplied and operated commercial cultivation enterprises in Plaintiffs' home countries failed to inform and protect the workers using DBCP. (Amended Complaint, at ¶¶ 36, 56, 60-61, 74.) It is conceivable that

such situations put a country in the position where it must balance the need to protect its workers with the need to encourage economic development. Moreover, suits against companies that invest in foreign countries can raise important economic questions for those countries.

In light of the allegations raised in Plaintiffs' Amended Complaint, the Court finds that this action raises issues of federal common law by implicating important foreign relations concerns. Accordingly, the Court finds that it has federal question jurisdiction over the instant action and that removal of the action was proper.[6] Plaintiffs' motions for remand are therefore DENIED.

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6. By Final Judgment filed October 27, 1995, Judge Lake of the United States District Court for the Southern District of Texas permanently enjoined the plaintiffs and persons acting in concert with the plaintiffs, such as attorneys who appeared in the cases before him, from commencing or causing to be commenced in any court in the United States any action involving DBCP-related claims. (Certain Defendants' Motion to Dismiss and for Injunctive Relief, Exh. 6.) Defendants indicate that at least one of the plaintiffs in the Complaint filed on October 3, 1997, Melgar Olimpio Moreno, was a plaintiff in one of the actions before Judge Lake. At the hearing on April 6, 1998, attorney Scott Hendler for Plaintiffs stated that the inclusion of the plaintiff identified by Defendants as being covered by the injunction was a clerical error. On March 3, 1998, Plaintiffs filed an Amended Complaint which did not include Melgar Olimpio Moreno as a plaintiff. Accordingly, the Court in this instance does not find it necessary to enforce the injunction established by Judge Lake.

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IV. CERTAIN DEFENDANTS' MOTION TO DISMISS AND FOR INJUNCTIVE RELIEF

All of the Defendants except for Defendants AMVAC Chemical Corporation, Del Monte Fresh Produce Hawaii, Inc., and Fresh Del Monte, N.V. move to dismiss the instant action under the doctrine of forum non conveniens and under principles of international comity.[7] Defendants also seek a

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7. Generally, the doctrine of forum non conveniens cannot apply if there is an absence of jurisdiction. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947). Under this principle, the Court would ordinarily be required to address the motions to dismiss for lack of personal jurisdiction filed by Standard Fruit Company, Standard Fruit Company de Costa Rica, S.A., Standard Fruit Company de Honduras, S.A., Standard Fruit and Steamship Company, Dole Fresh Fruit International, Inc., and Dole Fresh Fruit International, Limited (collectively, "Standard Fruit and Dole entities") before addressing the motion to dismiss on forum non conveniens grounds. There are, however, rare cases in which a district court can resolve the forum non conveniens issues prior to resolving personal jurisdiction issues. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1351 n. 57 (S.D. Tex. 1995); *Syndicate 420 at Lloyd's London v. Early American Ins. Co.*, 796 F.2d 821, 827 n.8 (5th Cir. 1986). "Where . . . the arguments in favor of dismissal are strong, and the jurisdictional objections are inapposite to all but a few parties, the District Court can proceed directly to the resolution of the forum non conveniens issue." *Syndicate 420*, 796 F.2d at 827 n.8. The Court finds that in the instant action, it can proceed to address the forum non conveniens issue prior to addressing the motions to dismiss for lack of personal jurisdiction. Only six of the twenty defendants have moved to dismiss for lack of personal jurisdiction. Moreover, the Standard Fruit and Dole entities have stipulated to delay consideration of the motions to dismiss for lack of personal jurisdiction until after the Court has

(Cont'd)

mandatory injunction against Plaintiffs enjoining them from filing further DBCP related suits.

A. *Plaintiffs' Motion to Strike*

On April 3, 1998, Plaintiffs filed a Motion to Strike six supplemental affidavits submitted with Defendants' Reply Memorandum in Support of Certain Defendants' Motion to Dismiss and for Injunctive Relief. Plaintiffs contend that the supplemental affidavits of foreign law experts should be stricken because Defendants have raised issues in their reply brief that were not addressed in their motion to dismiss. The Court does not agree that Defendants' reply brief raised issues that were not addressed in their motion to dismiss. Furthermore, the Court provided Plaintiffs the opportunity to respond to the matters raised in Defendants' reply brief by allowing both parties to file supplemental briefs on the foreign law issues. (Minute Order filed April 7, 1998.) Plaintiffs did file a supplemental brief on April 27, 1998.

Plaintiffs also argue that Defendants should not be allowed to submit the supplemental affidavits because Defendants had successfully opposed Plaintiffs' request to depose Defendants' foreign law experts. The lack of Plaintiffs' opportunity to depose Defendants' foreign law experts does not make the affidavits of Defendants' foreign law experts unavailable for the Court to consider.

(Cont'd)
heard the motion to dismiss on forum non conveniens grounds. (Stipulation to Continue Motions to Dismiss for Lack of Personal Jurisdiction, Improper Venue and Insufficiency of Service of Process filed April 2, 1998.)

Furthermore, Plaintiffs had an opportunity to submit their own evidence relating to the foreign law issues in response to Defendants' motion to dismiss.

Based on the foregoing, the Court DENIES Plaintiffs' motion to strike. The Court will consider the supplemental affidavits submitted with Defendants' reply brief, along with the additional information the parties supplied in their supplemental briefs relating to Plaintiffs' motion to strike.

B. *Forum Non Conveniens*

Under the common-law doctrine of forum non conveniens, a district court may decline to exercise its jurisdiction over a case when a foreign tribunal can more appropriately conduct the litigation. *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944, 945 (1st Cir. 1991). If the Court decides that the case should more appropriately be tried in a foreign forum, it may dismiss the case. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1409 (9th Cir. 1983).

Determination of whether forum non conveniens dismissal is warranted is committed to the sound discretion of the trial court; it may be reversed only when there has been a clear abuse of discretion. *Contact Lumber Co. v. P.T. Moges Shipping Co., Ltd.*, 918 F.2d 1446, 1448-49 (9th Cir. 1990) (citations omitted).

A party moving for forum non conveniens dismissal has the burden of demonstrating two elements: 1) the existence of an adequate alternative forum; and 2) that the balance of relevant private and public interest factors favor dismissal.

Creative Technology, Ltd. v. Aztech System PTE, Ltd., 61 F.3d 696, 699 (9th Cir. 1995). To meet this burden, Defendants must provide sufficient information to enable the Court to balance the parties' interests. *Contact Lumber*, 918 F.2d at 1449. If Plaintiffs, however, can demonstrate that choice of law requires retaining the case, the motion to dismiss should be denied. *Id.*

Where the plaintiff is non-foreign, there is a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors weigh in favor of trial in the alternative forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981). This is because "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient." *Id.* When the plaintiff is foreign, however, this assumption is less reasonable and the plaintiff's choice is afforded less deference. *Id.* In such case, the showing required to obtain dismissal is reduced. *See Empresa Lineas Martimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 371 (5th Cir. 1992).

1. *Adequate Alternative Forum*

The first step in forum non conveniens analysis is to determine whether an adequate alternative forum exists. *Creative Technology*, 61 F.3d at 701. In the instant case, Plaintiffs are citizens of the countries of Costa Rica, Ecuador, Guatemala, and Panama. (Amended Complaint, at ¶ 1.) Evaluation of Defendants' forum non conveniens argument will thus require evaluation of whether an adequate alternative forum is provided in each of these four countries.

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Defendants must establish that an adequate and available forum exists for all the plaintiffs in the case. *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1164 (5th Cir. 1987), *vacated on other grounds, Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989).

a. *Availability of Alternative Forums*

An alternative forum is generally deemed to exist if the defendant is "amenable to process" in the alternative forum. *Piper Aircraft*, 454 U.S. at 255 n.22. In rare circumstances, however, where the remedy offered by the alternative forum is clearly unsatisfactory, the requirement of an adequate alternative forum may not be satisfied with the defendant being amenable to process. *Creative Technology*, 61 F.3d at 701. For example, dismissal under the doctrine of forum non conveniens would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute. *Id.* (citing *Piper Aircraft*, 454 U.S. at 255 n.22.)

To support their claim that adequate alternative forums exist for Plaintiffs' claims, Defendants cite previous DBCP cases which held that Guatemala, Costa Rica, Ecuador, and Panama exist as adequate alternative forums. *See e.g. Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995); *Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833 (S.D. Flor. 1987), *rev'd on other grounds*, 883 F.2d 1553 (11th Cir. 1989); *Valentin Valdez-C v. Coahoma Chemical Co., Inc.*, Civil No. 1:96cv362GR, S.D. Miss. 1997, (attached as Exh. 1 to Certain Defendants' Motion to Dismiss and for Injunctive Relief ("Def. Motion to Dismiss")); *Aguilar v. Dow Chemical Co.*, Case No. 86-4753 JGD (TX), C.D. Calif. (1986) (attached as Exh. 4 to Def. Motion to Dismiss).

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Plaintiffs contest the availability of adequate alternative forums in Plaintiffs' home countries on the basis that the foreign courts lack jurisdiction over Plaintiffs' claims and over Defendants. In support of these contentions, Plaintiffs submit the Declaration of Professor Alejandro M. Garro of the Columbia School of Law who states that "if these foreign plaintiffs were to seek redress in their home countries after having chosen to sue at the place of defendants' domicile, the courts of those countries will refuse to hear their claims." (March 16, 1998 Declaration of Professor Alejandro M. Garro attached as Exh. 2(A) to Plaintiffs' Response to Defendants' Motion to Dismiss ("Plt. Response to Def. Motion to Dismiss") ("3/16/98 Garro Decl."), at ¶ 7.) The Court will address the availability of the courts of each of the Plaintiffs' home countries.

i. *Panama*

Defendants submit the affidavits of Dr. Jorge Fabrega, an Alternate Justice of the Supreme Court of Panama. (*See* Affidavits of Dr. Jorge Fabrega at Panama II, Exh. A & B ("Fabrega Aff. at Panama II, Exh. A & B.") attached to Declaration of Boaz S. Morag dated March 25, 1998 submitted with Reply Memo. in Support of Certain Defendants' Motion to Dismiss and for Injunctive Relief ("3/25/98 Morag Decl.").) Dr. Fabrega states that Plaintiffs' claims may be heard and resolved in the Panamanian courts. (Fabrega Aff. at Panama II, Exh. A ¶ 3.) He explains that under Article 258 of the Code of Civil Procedure of Panama, a Panamanian court can have jurisdiction over an action on the basis that the alleged injury occurred within the jurisdiction, notwithstanding the non-residence of the

Defendants in the jurisdiction. (Fabrega Aff. at Panama II, Exh. A ¶ 4; Exh. B ¶ 10.) Moreover, a Panamanian court may exercise jurisdiction over a defendant that would ordinarily not be amenable to jurisdiction in Panama if the defendant voluntarily consents to the jurisdiction of Panama. (Fabrega Aff. at Panama II, Exh. A ¶ 5.)

Plaintiffs submit the declarations of Professor Garro in support of their contention that the courts of Panama would not have jurisdiction to hear Plaintiffs' claims. Professor Garro states that if a tort action were to be brought by a Panamanian national against a defendant domiciled in the United States, the Panamanian courts would refuse to exercise jurisdiction over the case if a court in the United States referred the parties to Panama. (3/16/98 Garro Decl., at ¶ 17.) Professor Garro refers to a September 20, 1995 decision of the Second Civil Circuit Court of the First Judicial Circuit of Panama in which the court declined to take jurisdiction over a tort suit brought against business corporations domiciled in the United States. (3/16/98 Garro Decl., at ¶ 15.) The Panamanian court found that under Article 254 of the Judicial Code of Panama, business corporations ought to be sued before the courts where their main place of business is located. (3/16/98 Garro Decl., at ¶ 15.) This evidence does not convince the Court that a Panamanian court would not have jurisdiction to hear Plaintiffs' claims. As pointed out by Defendants, the Panamanian courts could have jurisdiction over Plaintiffs' claims on the basis that the alleged injuries occurred in Panama and through Defendants' voluntary consent.

Plaintiffs further argue that the Panamanian courts would disregard any attempts to create jurisdiction by stipulation

of the parties. They indicate that since the dismissal of the *Delgado* action which involved claims filed by banana workers allegedly exposed to DBCP, the Panamanian courts have declined to hear the plaintiffs' action refiled in Panama. (*See* Exh. 4 to Plt. Response to Def. Motion to Dismiss.)

Defendants respond by pointing out explanations for the dismissal of the DBCP action in Panama. According to Dr. Fabrega, the plaintiffs wrongfully filed suit in Panama Province rather than the provinces in which the plaintiffs were injured. (Fabrega Aff. at Panama II, Exh. B ¶ 10-11.) Moreover, while jurisdiction would have been proper if the defendants consented to jurisdiction, the Panamanian court was not informed of the defendants' agreement to consent to jurisdiction in Panama. (Fabrega Aff. at Panama II, Exh. B ¶ 12.)

The Court finds that the evidence before the Court indicates that the Panamanian courts could constitute an available alternative forum to hear Plaintiffs' claims.

ii. *Costa Rica*

Defendants submit the June 12, 1995 Affidavit of Dr. Atilio Vincenzi, an attorney in Costa Rica and a former Supreme Court Justice of Costa Rica. (*See* Affidavit of Dr. Atilio Vincenzi at Costa Rica II, Exh. D attached to 3/25/98 Morag Decl. ("Vincenzi Aff. at Costa Rica II, Exh. D").) According to Dr. Vincenzi, Costa Rican courts would have jurisdiction to hear an action based on the sale of products in the country notwithstanding the fact that the defendants are foreign entities. (Vincenzi Aff. at Costa Rica II, Exh. D

¶ 5.) The nationality of the defendants would not preclude jurisdiction if the alleged injuries were caused by the use of the products in the country. (Vincenzi Aff. at Costa Rica II, Exh. D ¶ 5-6.) If the alleged injuries occurred in the country, the Costa Rican courts would have jurisdiction to hear the case even if the action was previously dismissed by a United States court. (Vincenzi Aff. at Costa Rica II, Exh. D ¶ 6.)

Plaintiffs submit the declarations of Professor Garro in which he states that Costa Rican courts would refuse to exercise jurisdiction over Plaintiffs' claims if the United States referred the parties to Costa Rica. (3/16/98 Garro Decl., at ¶ 17.) Professor Garro refers to several Costa Rican decisions in which it was found that the Costa Rican courts did not have jurisdiction over tort actions brought against defendants domiciled in the United States. (3/16/98 Garro Decl., at ¶ 16; October 17, 1996 Declaration of Professor Alejandro M. Garro attached as Exh. 2(B) to Plt. Response to Def. Motion to Dismiss ("10/17/96 Garro Decl."), at ¶ 8.) Professor Garro explains that the rulings were based on a Costa Rican court's interpretation that the manufacturing of products abroad does not constitute a wrongful act occurring in Costa Rica and that the court lacks jurisdiction over actions arising out of the manufacturing of goods outside of Costa Rica. (10/17/96 Garro Decl., at ¶ 8.) Professor Garro also refers to the Costa Rican case of *Carlos Luis Abarca Abarca v. Shell Oil Co.* in which a Costa Rican court refused to take jurisdiction of a DBCP case dismissed by the District of Texas on forum non conveniens grounds. (10/17/96 Garro Decl., at ¶¶ 6, 8; Costa Rica II, Exh. E attached to 3/25/98 Morag Decl.) Professor Garro explains that the court declined to take jurisdiction because the plaintiffs appeared before the

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Costa Rican courts not out of their own will, but out of a decision of a foreign court to dismiss the case on forum non conveniens grounds. (10/17/96 Garro Decl., at ¶ 8.)

Defendants point out that the Supreme Court of Costa Rica has held that the Costa Rican civil courts have jurisdiction to hear DBCP-related claims by Costa Rican citizens against their employers and non-resident DBCP manufacturers. (Declaration of Miguel Blanco Quiros at Costa Rica II, Exh. A Annex B to 3/25/98 Morag Decl. ("Quiros Decl. at Costa Rica II, Exh. A Annex B"), ¶ 11; Exh. 5 to Defendants' Response to Plaintiffs' Motion to Strike.) Defendants also offer an alternative explanation for why the *Abarca* case was dismissed in Costa Rica. Defendants state that the Costa Rican plaintiffs i) expressed doubt as to the court's jurisdiction; ii) informed the court that the Texas court would reassume jurisdiction if the Costa Rican courts dismissed the action and iii) did not serve the defendants or inform the court that the defendants had agreed to submit to the jurisdiction of Costa Rican courts. (Reply Memo. in Support of Certain Defendants' Motion to Dismiss and for Injunctive Relief, at 5.)

Based on the foregoing, the Court finds that there is sufficient evidence indicating that the courts of Costa Rica constitute an available alternate forum for Plaintiffs' claims.

iii. *Guatemala*

Defendants submit the declarations of Ricardo Sagastume Vidaurre, former Chief Justice of the Supreme Court of Justice of Guatemala. (*See* Declarations of Ricardo

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Sagastume Vidaurre at Guatemala II, Exh. A to 3/25/98 Morag Decl. ("Vidaurre Aff. at Guatemala II, Exh. A").) Mr. Vidaurre states that the courts of Guatemala would have jurisdiction to hear a case where the alleged damage occurred in Guatemala because in an action for damages, the court of the place where damages were caused would have jurisdiction over the action. (Vidaurre Aff. at Guatemala II, Exh. A, Annex A ¶¶ 23-24.)

Plaintiffs contend that under a Guatemalan statute which declares the doctrine of forum non conveniens unacceptable and invalid, Guatemalan courts would not have jurisdiction to hear Plaintiffs' claims.[8] (3/16/98 Garro Decl., at ¶¶ 9-14.)

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8. The Guatemalan statute provides in relevant part:

> *Article 1*
>
> Because it is in violation of the rights that the Political Constitution of the Republic and the judicial order of Guatemala guaranteed to its nationals and residents, the theory called "Forum Non Conveniens" is declared unacceptable and invalid, when it intervenes to prevent the continuation of a lawsuit in the domiciliary courts of the defendants. . . .
>
> *Article 3*
>
> If having informed the foreign judge about the reach of this law and the same refuses to hear the case submitted to his jurisdiction, as an exceptional measure and to avoid procedural abandonment of the Guatemalan nationals and residents, the national judges can reassume jurisdiction. But in specific cases they will have to observe the following methods . . .

(Guatemala II, Exh. C attached to 3/25/98 Morag Decl.)

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Contrary to Plaintiffs' assertions, the Guatemalan statute does not require a Guatemalan court to refuse jurisdiction over a case dismissed on forum non conveniens grounds. Article 3 of the Guatemalan statute expressly provides that if a foreign judge declines to exercise jurisdiction of a case on foreign non conveniens grounds, the Guatemalan court may as "an exceptional measure to avoid procedural abandonment of the Guatemalan residents and nationals," reassume jurisdiction of the case if certain criteria are met. (Guatemala II, Exh. C to 3/25/98 Morag Decl.) This indicates that a Guatemalan court may assume jurisdiction over a case dismissed in the United States on forum non conveniens grounds.

Plaintiffs point out that a Guatemalan court found that it did not have jurisdiction over a DBCP case dismissed on forum non conveniens grounds. (3/16/98 Garro Decl., at ¶ 13.) Defendants contend that the dismissal of the DBCP case is not persuasive here as the plaintiffs in that case engineered dismissal in Guatemala by expressing disapproval of the forum non conveniens dismissal and informing the court that dismissal might persuade a United States court to reassert jurisdiction. (Vidaurre Decl. at Guatemala II, Exh. A ¶¶ 5-6.) The evidence before the Court does not indicate that the Guatemalan courts would not assume jurisdiction over Plaintiffs' claims.

Based on the foregoing, the Court finds that there is sufficient evidence that Guatemalan courts could provide an alternative forum for Plaintiffs' claims. There is nothing before the Court which indicates that the courts of Guatemala would not be available to Plaintiffs.

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iv. *Ecuador*

Defendants submit the affidavits of Dr. Enrique Ponce y Carbo, a former Justice of the Supreme Court of Ecuador. (*See* Affidavit of Dr. Enrique Ponce y Carbo at Ecuador II, Exh. A attached to 3/25/98 Morag Decl. ("Ponce y Carbo Decl. at Ecuador II, Exh. A"); April 2, 1998 Affidavit of Dr. Enrique Ponce y Carbo at Exh. 10 to Defendants' Response to Plaintiffs' Motion to Strike ("4/2/98 Ponce y Carbo Aff.").) Dr. Ponce y Carbo states that under the Code of Civil Procedure of Ecuador, Ecuadorian courts have jurisdiction over an action if the injury was caused in Ecuador. (Ponce y Carbo Aff. at Ecuador II, Exh. A. ¶ 4.) Where the defendants are not residents in the jurisdiction, an Ecuadorian court would have jurisdiction on the basis that the alleged tort was committed within the jurisdiction. (Ponce y Carbo Decl. at Ecuador II, Exh. A ¶ 4.) Under this principle, Ecuadorian courts could have jurisdiction over a non-resident manufacturer of a product which allegedly caused injuries in Ecuador. (Ponce y Carbo Decl. at Ecuador II, Exh. A ¶ 4.) Moreover, an Ecuadorian court can exercise jurisdiction over a defendant that would not otherwise be amenable to jurisdiction in Ecuador if the defendant does not contest jurisdiction in Ecuador and voluntarily consents to the exercise of the Ecuadorian court's jurisdiction. (Ponce y Carbo Decl. at Ecuador II, Exh A ¶ 5.)

Plaintiffs contend that under an Ecuadorian statute enacted in January 1998, Ecuadorian courts would not have jurisdiction over Plaintiffs' claims if this action is dismissed on forum non conveniens grounds. The Ecuadorian statute provides, in relevant part:

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> Without prejudice to their literal meaning, articles 27, 28, 29, and 30 of the Code of Civil Procedure shall be interpreted in the sense that in case of concurrent international jurisdiction, the plaintiff may freely choose between bringing suit in Ecuador or in a foreign country . . . If a suit were to be filed outside Ecuador, the national competence and jurisdiction of Ecuadorean courts shall be definitely extinguished.

(3/16/98 Garro Decl., at ¶ 11.)

Defendants respond by pointing out that the legality and retroactive effect of this statute is questionable. They submit the affidavit of Dr. Ponce y Carbo which indicates that the statute is unconstitutional and therefore not effective because the statute was not signed by the President of Ecuador as required by Ecuador's Constitution. (4/2/98 Ponce y Carbo Aff., at ¶¶ 7-16.) Defendants also submit the affidavit of Dr. Rafael Pino Rubira, an attorney in Ecuador. (Affidavit of Dr. Rafael Pino Rubira, attached as Exh. 11 to Defendants' Response to Plaintiffs' Motion to Strike ("Rubira Aff.") Dr. Rubira states that even if the Ecuadorian statute was constitutional, it would not apply to judgments made prior to the January 30, 1998 effective date of the statute. (Rubira Aff., at ¶ 11.) Dr. Rubira states that in 16 of 27 cases filed by shrimp farmers in Ecuador after their cases were dismissed on forum non conveniens grounds, judges in Ecuador assumed jurisdiction over the cases. (Rubira Aff., at ¶¶ 8 & 12.) The judges refused to apply the Ecuadorian statute on the basis that the statute did not apply retroactively. (Rubira Aff. at ¶ 12.)

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Defendants contend that the Ecuadorian statute is not applicable to Plaintiffs' claims as Plaintiffs filed their claims in the United States prior to the passing of the Ecuadorian statute. Defendants argue that the statute would not apply retroactively to Plaintiffs' claims.

The Court finds that the constitutionality and applicability of the Ecuadorian statute to Plaintiffs' claims are not clear given the decisions of several Ecuadorian trial courts and the opinions of Defendants' experts. In light of the uncertainty relating to the statute, the Court finds that it has no basis for concluding that the courts of Ecuador are not available to Plaintiffs' claims.

Based on the foregoing, the Court concludes that there is no basis for finding that the courts of Plaintiffs' home countries are not available for Plaintiffs' claims. In order to ensure the availability of an alternative forum in each of Plaintiffs' home countries, however, the Court will condition dismissal of the action upon 1) Defendants' stipulation to submit to the jurisdiction of the foreign forums involved in this action and to waive all jurisdictional and statute of limitations defenses; and 2) acceptance of jurisdiction by the foreign courts involved in these cases. *See Contact Lumber*, 918 F.2d at 1450 (dismissal conditioned on a defendant's submission to jurisdiction in a foreign court satisfies the requirement of an alternative forum); *Delgado*, 890 F. Supp. at 1357.

b. *Adequacy of the Alternative Forums*

The key question in determining whether an alternative forum is adequate is whether "the remedy provided by the

alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Creative Technology*, 61 F.3d at 701 (quoting *Piper Aircraft*, 454 U.S. at 254). A forum is generally considered adequate if the forum provides a potential avenue for redress; the possibility that the foreign court will apply law that is less favorable to the plaintiff does not render the forum inadequate. *Id.* at 702-03.

The affidavits of foreign law experts submitted by Defendants indicate that the legal systems of the Plaintiffs' countries meet the adequacy requirement. Defendants summarize the testimony as follows:

- Each country provides its citizens with a right of action for money damages against the manufacturer or supplier of a defective product.
- In each country, a plaintiff may also assert a claim against his employer for injuries sustained while employed.
- In each country, a plaintiff may assert claims for negligence.
- Each country guarantees the right of all parties to a fair trial.
- Each country provides a mechanism for consolidation of similar claims.
- Each country provides discovery procedures to gather evidence, to obtain the testimony of witnesses and to compel the production of documents.

(Def. Motion to Dismiss, at 14-15.)

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Plaintiffs point to three factors that supposedly render the courts of their home countries inadequate: 1) lack of contingency fees and other financial barriers; 2) severely limited discovery and restricted access to means of proof; and 2) delay and other problems.

i. *Lack of Contingency Fees and Other Financial Hardships*

Plaintiffs assert that the unavailability of contingency fee arrangements in their home countries prevents the alternative forums from being deemed adequate.

There is a division in authority on whether the absence of contingency fee arrangements may cause a forum to be deemed inadequate. *Murray v. British Broadcasting Corp.*, 81 F.3d 287, 292-93 (2nd Cir. 1996). The majority of courts regard the absence of contingent fee arrangements to be only one factor to be weighed in determining the balance of convenience after the court determines that an alternative forum is available. *Id.* As the Second Circuit points out, this approach is sensible. "Balancing the plaintiff's financial burdens as one of several relevant factors serves the 'repeatedly emphasized . . . need to retain flexibility' in the application of the forum non conveniens doctrine . . . . Indeed, to do otherwise would render the financial burden on a plaintiff the 'determinative factor.' " *Id.* at 292 (quoting *Piper Aircraft*, 454 U.S. at 249) (further citation omitted). Most foreign forums do not allow contingency fees, so if a court held the lack of contingent fee arrangements to be determinative, then few foreign forums would be adequate. *Id.*; *see also Piper Aircraft*, 454 U.S. at 252 n.18 ("[U]nlike

most foreign jurisdictions, American courts allow contingent attorney's fees[.]").

Based on the above, the Court finds that the lack of contingency fees in Plaintiffs' home countries does not deem the foreign forums inadequate.

Plaintiffs further argue that restrictions on damages in Plaintiffs' home countries render dismissal on forum non conveniens grounds improper. Plaintiffs submit testimony indicating that compensatory damages in Costa Rica and Guatemala would be generally limited to pecuniary losses. (Affidavit of Victor Perez Vargas, attached as Exh. 20 to Plt. Response to Def. Motion to Dismiss ("Vargas Aff."), at ¶ 17.; Affidavit of Francisco Villagran Kramer, attached as Exh. 19 to Plt. Response to Def. Motion to Dismiss ("Kramer Aff."), at ¶ 7). They also assert that in Panama, damages for pain and suffering would be limited to US $3,000. (Affidavit of Gilberto Boutin, attached as Exh. 15 to Plt. Response to Def. Motion to Dismiss ("Boutin Aff."), at ¶¶ 1-4.) Plaintiffs argue that these financial hardships and restrictions on damages render forum non conveniens dismissal inappropriate.

"A court may dismiss on forum non conveniens grounds even though the foreign forum does not provide the same range of remedies as are available in the home forum." *Creative Technology*, 61 F.3d at 701-02 (quoting *Ceramic Corp. of America v. Inka Maritime Corp.*, 1 F.3d 947, 949 (9th Cir. 1993)). The prospect of a lower recovery in the alternative forum does not justify refusing to dismiss on forum non conveniens grounds. *Alcoa Steamship Co., Inc. v.*

M/V Nordic Regent, 654 F.2d 147, 159 (2d Cir. 1980). As stated above, Defendants have submitted testimony indicating that each of Plaintiffs' countries provides its citizens with remedies that would address Plaintiffs' alleged injuries. Each country provides its citizens with a right of action for money damages against the manufacturer or supplier of a defective product. (April 5, 1994 Declaration of Miguel Blanco Quiros at the "Costa Rica" exhibit to the December 19, 1997 Affidavit of Burt Ballanfant attached to Def. Motion to Dismiss ("12/19/97 Ballanfant Aff.") ("4/5/94 Quiros Decl."), at ¶ 10; August 17, 1994 Affidavit of Dr. Enrique Ponce y Carbo at the "Ecuador" exhibit to 12/19/97 Ballanfant Aff. ("8/17/94 Ponce y Carbo Aff."), at ¶¶ 12-14; April 4, 1995 Declaration of Ricardo Sagastume Vidaurre attached at the "Guatemala" exhibit to 12/19/97 Ballanfant Aff. ("4/4/95 Vidaurre Decl."), at ¶ 15; August 31, 1994 Affidavit of Dr. Jorge Fabrega at the "Panama" exhibit to 12/19/97 Ballanfant Aff. ("8/31/94 Fabrega Aff."), at ¶ 13.) In each country, a plaintiff may assert claims for negligence. (4/5/94 Quiros Decl., at ¶ 10; 8/17/94 Ponce y Carbo Aff., at ¶ 18; 4/4/95 Vidaurre Decl., at ¶ 15; 8/31/94 Fabrega Aff., at ¶ 15.) Plaintiffs will not be left with clearly inadequate or unsatisfactory forums. Accordingly, the Court finds that the alleged restrictions on Plaintiffs' remedies and damages do not render the foreign forums inadequate.

Plaintiffs also contend that they may not be able to enforce damage awards in many instances because Defendants have no assets in the foreign forums. While Plaintiffs do not offer any concrete evidence to support their contention, the issue is an important one. The Court conditions dismissal of this action upon Defendants'

agreement to satisfy any final judgment rendered in favor of Plaintiffs by a foreign court. *See Alcoa Steamship Co., Inc.*, 654 F.2d at 159 n.16; *Delgado*, 890 F. Supp. at 1373.

ii. *Limited Discovery*

Plaintiffs contend that limited discovery and restricted access to means of proof in the courts of their countries deem the alternative forums inadequate.

"[T]he unavailability of beneficial litigation procedures similar to those available in the federal district courts" does not render a foreign forum inadequate. *Borden, Inc. v. Meiji Milk Products, Co., Ltd.*, 919 F.2d 822, 829 (2d Cir. 1990) (citation omitted). A country does not need to afford litigants expansive pretrial discovery comparable to those found in the United States. *Proyectos Orchimex de Costa Rica, S.A. v. E.I. du Pont de Nemours & Co.*, 896 F. Supp. 1197, 1201 (M.D. Flor. 1995). For example, in *Lockman Foundation v Evangelical Alliance Mission*, 930 F.2d 764, 768-69 (9th Cir. 1991), the Ninth Circuit held that different pretrial discovery in Japan did not render the Japanese forum inadequate. The Supreme Court has recognized that "discovery is more extensive in American than in foreign courts." *Piper Aircraft*, 454 U.S. at 252 n.18. The forum non conveniens doctrine would be essentially eliminated if the adequacy of a foreign forum depended on the availability of comparable discovery.

Based on the above, the Court finds that the courts of Plaintiffs' countries should not be deemed inadequate on the basis that they do not permit discovery comparable to that in the United States.

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iii. *Delay and Other Differences*

Plaintiffs contend that the Court should not dismiss their claims because delays in Plaintiffs' countries will deny them substantial justice. They assert that the courts of Plaintiffs' countries do not have the adequate infrastructure or procedures to handle vast numbers of cases.

A foreign forum can be deemed inadequate if litigation delays are so egregious that they would effectively render a plaintiff's remedy meaningless. *See Bhatnagar v. Surrendra Overseas Ltd.*; 52 F.3d 1220, 1227-29 (3d Cir. 1995). For example, in *Bhatnagar*, the Third Circuit concluded that evidence showing that the Indian judicial system was on the verge of collapse and that it could take up to twenty-five years to resolve the action warranted finding the Indian courts were an inadequate alternative forum. *Id.*

Because, however, litigation delay is so pervasive, minor delay cannot render an alternative forum inadequate. *Id.* Accordingly, delays of a few years are not dispositive in a forum non conveniens inquiry. *Id.*

Plaintiffs submit the declaration of Professor Garro who estimates that it could take between ten to fifteen years to try Plaintiffs' claims in their home countries. (October 17, 1996 Declaration of Professor Alejandro M. Garro at Exhibit 2(B) to Plt. Response to Def. Motion to Dismiss, ¶ 43.) Professor Garro bases his opinion on the declarations of legal counsel who indicate that the complexity of the claims and magnitude of the action could result in a delay of the actions. None of the legal counsel cited by Professor Garro, however,

explicitly state that it would take ten to fifteen years to hear Plaintiffs' claims.

If Plaintiffs' claims were tried in the United States, the complexity and magnitude of the action would also prevent the case from being tried expeditiously. *See Delgado*, 890 F. Supp. at 1368. The nature of the case is such that trial of Plaintiffs' claims would face delay in any forum. In light of this, the Court finds that the prospect of delay in Plaintiffs' home countries does not warrant deeming the courts of Plaintiffs' home countries inadequate.

Plaintiffs also allege that the foreign courts are inadequate because the Plaintiffs face trial without a jury in them. The Ninth Circuit rejected this argument in *Lockman*; the court held that the lack of jury trials in Japan does not render Japanese courts an inadequate forum. *Lockman*, 930 F.2d at 768. Accordingly, the lack of jury trials does not render the courts in Plaintiffs' home countries inadequate.

Based on the foregoing, the Court concludes that the first prong of the forum non conveniens analysis is met. Because dismissal will be conditioned upon 1) Defendants' waiver of all jurisdictional and limitations defenses; 2) acceptance of jurisdiction over these actions by the courts in each of the foreign countries; and 3) agreement by the Defendants to satisfy any final judgment rendered in favor of Plaintiffs by a foreign court, the Court concludes that Defendants' burden to establish the existence of an alternative forum in each of Plaintiffs' countries has been met.

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2. *Balance of Private and Public Interests*

Given the existence of an adequate alternative forum, the Court must balance private and public interests to see if the convenience of the parties would be served by dismissing the action so that the case can be heard in an alternative forum. *Creative Technology, Ltd.*, 61 F.3d at 699; *Contact Lumber*, 918 F.2d at 1449.

a. *Private Interest Factors*

Private interest factors include 1) the relative ease of access to sources of proof; 2) the availability of compulsory process for attendance of hostile witnesses; 3) the cost of obtaining the attendance of willing witnesses; 4) the possibility of on-site inspection if appropriate to the action; and 5) other problems that interfere with an expeditious trial. *Contact Lumber*, 918 F.2d at 1451.

i. *Ease of Access to Sources of Proof*

Plaintiffs allege that their injuries were caused in part by the defective marketing of DBCP through which Defendants manufactured, sold, distributed and used DBCP after they knew that DBCP could cause the injuries Plaintiffs suffered. Issues relating to these claims include 1) whether Plaintiffs were exposed to a particular defendant's product; 2) whether Plaintiffs were actually injured; 3) whether Defendants violated a duty by failing to provide adequate warnings or by marketing an unreasonably dangerous product; and 4) whether Defendants have a defense to their liability in Plaintiffs' own conduct. *Delgado*, 890 F. Supp. at 1366.

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Defendants submit the affidavit of Burt Ballanfant, Senior Litigation attorney for Defendant Shell Oil Company. Mr. Ballanfant indicates that the greatest concentration of evidence relating to these issues of injury, diagnosis, cause, and fault are where the alleged exposure and injury took place. (12/19/97 Ballanfant Aff., at ¶¶ 5-17.) Mr. Ballanfant points out that Defendants will need to develop evidence relating to each plaintiff's exposure to DBCP from witnesses such as the plaintiffs, their co-workers, supervisors, and employers. These witnesses are almost exclusively located in Plaintiffs' home countries. (12/19/97 Ballanfant Aff., at ¶ 6.) Assuming exposure to DBCP, Defendants would also need to collect evidence relating to each plaintiff's personal and medical history such as the testimony of doctors, pathologists, the plaintiff's friends, and acquaintances, almost all of whom would be located in Plaintiffs' home countries. (12/19/97 Ballanfant Aff., at ¶¶ 10-12.) Such evidence would not be within the subpoena power of the federal court. (12/19/97 Ballanfant Aff., at ¶ 16.)

Plaintiffs point out that their claims of injury caused by products invented, tested, formulated, manufactured, labeled, regulated and sold in the United States will be decided upon evidence located in the United States. (March 17, 1998 Affidavit of Christian H. Hartley attached at Exh. 1 to Plt. Response to Def. Motion to Dismiss ("3/17/98 Hartley Aff."), at ¶ 6.) Mr. Hartley indicates that documents relating to the invention, testing, marketing, and usage of DBCP which are important for proving liability issues would be found in the United States. (3/17/98 Hartley Aff., at ¶ 7-12.) Plaintiffs further allege that each plaintiff can only testify in the United States (3/17/98 Hartley Aff., at ¶ 9), and that corporate

documents located in the United States would not be permitted as evidence in Plaintiffs' countries (3/17/98 Hartley Aff., at ¶ 12.) Evidence before the Court, however, indicates that documents obtained in the United States could be used in the courts of Plaintiffs' home countries. (Sworn Statement of Dr. Gilberto Boutin attached as Exh. 15 to Plt. Response to Def. Motion to Dismiss, at ¶ 21 (documents generated in the United States can be used in Panama if duly authenticated in the United States for use in Panama); Affidavit of Mario Fuetes at Guatemala II, Exh. B to 3/25/98 Morag Decl., ¶ 9; Ponce y Carbo Decl. at Ecuador II, Exh. A ¶ 9; Vincenzi Aff. at Costa Rica II, Exh. D ¶ 13.)

The Court can dismiss the action subject to the condition that Defendants agree to provide evidence and records relevant to Plaintiffs' claims. *See Piper Aircraft*, 454 U.S. at 257 n. 25. The Court finds that fewer evidentiary problems would be posed if the action proceeded in Plaintiffs' home countries. To ensure that Plaintiffs have access to evidence located within the United States, the action will not be dismissed until 90 days after this order is filed. During that time, Plaintiffs may pursue expedited discovery against Defendants under the supervision of this Court. Dismissal will also be conditioned on the stipulation by Defendants that all discovery conducted during the pendency of this action may be used in any foreign proceeding.

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ii. *Availability of Compulsory Process for Attendance of Unwilling Witnesses and Costs of Obtaining Attendance of Willing Witnesses*

Defendants' evidence indicates that a majority of fact witnesses reside in Plaintiffs' home countries. (12/19/97 Ballanfant Aff., at ¶¶ 6-8, 16.) Most of these witnesses would not be subject to the subpoena power of this Court. (12/19/97 Ballanfant Aff., at ¶¶ 8, 16.) Moreover, because many of the documents and most of the witness testimony would be in the languages of Plaintiffs' home countries, interpreters would be indispensable. (12/19/97 Ballanfant Aff., at ¶ 10.) Transportation costs to bring witnesses to Hawaii would be very high.

Defendants indicate that they may need to join as third party defendants persons such as Plaintiffs' employers and supervisors and the owners and operators of independent farms on which Plaintiffs may have worked. (12/19/97 Ballanfant Aff., at ¶ 8.) These people would not be subject to the compulsory process of this Court. (12/19/97 Ballanfant Aff., at ¶ 8.) These private factors all weigh in favor of dismissing the action.

Based on the foregoing, the Court finds that the private interests of the parties weigh in favor of dismissing the action.

b. *Public interest factors*

Public interest factors include: 1) administrative difficulties flowing from court congestion; 2) imposition of

jury duty on the people of a community that has no relation to the litigation; 3) local interest in having localized controversies decided at home; 4) the interest in having a diversity case tried in a forum familiar with the law that governs the action; and 5) the avoidance of unnecessary problems in conflicts of law. *Creative Technology*, 61 F.3d at 703-04.

i. *Likelihood that Court Will Need to Apply Foreign Law*

The need to apply foreign law weighs in favor of dismissal, although this factor alone is not sufficient to warrant dismissal when a balancing of all relevant factors shows that the plaintiff's chosen forum is appropriate. *Piper Aircraft*, 454 U.S. at 260 n. 29. Evaluation of this factor requires looking at the likelihood that the Court will have to apply foreign law to resolve the issues set forth in the instant action.

The choice of law inquiry has two aspects. First, the Court must determine if it should apply state or federal choice of law rules. *Schoenberg v Exportadora de SAL, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991). Second, applying the appropriate choice of law rules, the Court determines whose law applies in resolving the issues before the Court. *Id.*

In the instant action, the Court must apply federal choice of law rules because the Court's jurisdiction over the action is based on federal questions.[9] *Id.*

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9. Even if the Court found jurisdiction based on diversity and applied Hawaii choice of law rules, the outcome would be the same. (Cont'd)

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Federal common law follows the Restatement (Second) of Conflict of Laws approach. *Id.* Under the Second Restatement, there is "a presumption that the law of the place where the injury occurred applies." *Id.* at 783 (citations omitted).

In the instant case, the injuries occurred in Plaintiffs' home countries. (Amended Complaint, at ¶ 4.) Under the Second Restatement approach, the laws of Plaintiffs' home countries should apply unless some other state has a more significant relationship to the occurrence and the parties. *Id.*

The Second Restatement sets forth the following factors to consider in the "more significant relationship" test:

a) the needs of the interstate and international systems;

b) the relevant policies of the forum;

(Cont'd)
Application of either federal or Hawaii common law choice of law rules in the instant action lead to the same conclusion that the law of Plaintiffs' home countries would apply. Under Hawaii common law, conflict of laws issues are resolved by deciding which state has the strongest interest in seeing its law applies to a particular case. *Lemen v. Allstate Ins. Co.*, 938 F. Supp. 640, 643 (D. Haw. 1995). There is a presumption that Hawaii law applies unless another state's laws would best serve the interests of the states and persons involved. *Id.*

In the instant action, it appears that Plaintiffs' home countries have the most significant interest in resolving claims by the residents for injuries occurring from exposure to DBCP while employed within their respective countries.

c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;

d) the protection of justified expectations;

e) the basic policies underlying the particular field of law;

f) certainty, predictability and uniformity of result;

g) ease in the determination and application of the law to be applied.

Id.

Applying these factors, the Court concludes that the home countries of the Plaintiffs have the most significant relationship to the occurrences and parties in this action. The home countries of the Plaintiffs would have a greater interest in determining whether Plaintiffs are entitled to recovery for their injuries. As stated above, each of Plaintiffs' home countries provides causes of action under which Plaintiffs could seek redress.

If the Court retained the lawsuit, the Court would be forced "to conduct a complex exercise in comparative law and consider a foreign law with which the Court is not familiar and which is in a foreign language." *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215, 1217 n. 5 (11th Cir. 1985). Plaintiffs' home countries would be better able to apply their own law. *See Cabalceta*, 667 F. Supp. at 839. This public interest factor weighs in favor of dismissing the case.

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ii. *Local Interest in the Lawsuit*

Plaintiffs point out that Hawaii has an interest in the instant action. Defendants Dole Food Company Inc., Pineapple Growers Association of Hawaii, and Del Monte Fresh Produce Hawaii, Inc., which have their principal places of business in Hawaii, allegedly caused the development and testing of DBCP in Hawaii. (Amended Complaint, at ¶ 26.) Plaintiffs allege that large amounts of DBCP containing materials were manufactured, formulated, and sold from Hawaii and that Hawaii accordingly has an interest in ensuring that parties are compensated for injuries caused by tortious activity which took place in Hawaii. (Plt. Response to Def. Motion to Dismiss, at 22.)

The United States Supreme Court has indicated that the interest in deterring the production of defective products in the United States can be outweighed by other factors that a court should consider in engaging in a forum non conveniens inquiry. *See Piper Aircraft*, 454 U.S. at 260-61. In *Piper Aircraft*, the Court stated:

> Respondent argues that American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products, and that additional deterrence might be obtained if [defendants] were tried in the United States . . . However, the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant. The American interest in this accident is simply not sufficient to justify the

> enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here.

Id. This action involves injuries to foreign plaintiffs which occurred on foreign soil. Hawaii's and the United States' interests in the instant action are insignificant in comparison with the interests of the Plaintiffs' countries in the outcome of the litigation and in comparison with the burden that would be imposed on the court system, as discussed below. Accordingly, the Court finds that the local interest factor weighs in favor of dismissal.

iii. *Burden on the Court System and Imposition of the Jury*

As Defendants point out, Plaintiffs' choice of a United States forum places an extremely heavy burden on this Court. The claims present complex questions of agricultural practices, toxicology, and medical causation. Because of the large number of plaintiffs, it could take years to try the case. *See Delgado*, 890 F. Supp. at 1368. Enormous judicial resources would undoubtedly be consumed.

While a jury may have some interest in the litigation due to the presence of the Hawaii corporations, the bulk of the dispute appears to have little connection with Hawaii. None of the injured parties are from Hawaii; none of the injuries occurred here. The burden that a complex, lengthy trial would place on local jurors who would have to interpret the law of four different foreign countries does not appear to be justified. *See Creative Technology, Ltd.*, 61 F.3d at 703-04.

The burden that the instant action would place on this community weighs in favor of dismissal.

Based on the foregoing, the Court finds that dismissal of the instant action under forum non conveniens grounds is warranted. Defendants' burden of showing an adequate alternative forum has been met. Additionally, the balance of relevant private and public interest factors favor dismissal.[10]

C. *Request for Injunction*

Defendants request that the Court enter an injunction preventing future state and federal lawsuits in this matter. As mentioned above, Judge Lake of the United States District Court for the Southern District of Texas permanently enjoined the plaintiffs and persons acting in concert with the plaintiffs, such as attorneys who appeared in the cases before him, from commencing or causing to be commenced in any court in the United States any action involving DBCP-related claims. (Certain Defendants' Motion to Dismiss and for Injunctive Relief, Exh. 6.) In light of the existence of Judge Lakes' injunction, the Court does not believe it is necessary to issue another injunction here. The Court DENIES Defendants' motion for injunctive relief without prejudice. Should a situation arise that makes it appropriate to consider an injunction, the Court will allow Defendants to raise the issue anew.

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10. In light of the Court's conclusion that the action should be dismissed on forum non conveniens grounds, it is not necessary for the Court to reach Defendants' argument that the action should be dismissed under principles of international comity.

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V. CONCLUSION AND ORDER

A. *Plaintiffs' Motion For Remand and In Opposition to Foreign Sovereignty Immunities Act Jurisdiction*

The Court finds that neither Dead Sea nor BCL qualify as an agency or instrumentality of a foreign state under the FSIA. Removal of the action by the Dead Sea Defendants was therefore not proper. Plaintiffs' motion to remand the action to state court, however, is DENIED on the basis that removal was proper under Defendants' Supplemental Grounds for Removal.

B. *Plaintiffs' Motion for Remand and In Opposition to the Supplemental Grounds for Removal*

The Court finds that this action raises issues of federal common law by implicating important foreign relations concerns. Accordingly, the Court concludes that it has federal question jurisdiction over the instant action and that removal of the action was proper. Plaintiffs' Motion for Remand and In Opposition to the Supplemental Grounds for Removal is therefore DENIED.

C. *Certain Defendants' Motion to Dismiss and for Injunctive Relief*.

1. *Plaintiffs' Motion to Strike*

Plaintiffs' Motion to Strike is DENIED.

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2. *Certain Defendants' Motion to Dismiss on Forum Non Conveniens Grounds*

Defendants' motion to dismiss on forum non conveniens grounds is conditionally GRANTED. This action will be dismissed 90 days after the filing date of this order provided that:

a. Defendants have either waived or accepted service of process and waived any other jurisdictional defense within 40 days after this order is filed in any action commenced by a plaintiff in these actions in his home country or in the country in which his injury occurred. Any plaintiff desiring to bring such an action will do so within 30 days after the filing of this Order;

b. Defendants have waived within 40 days after the filing of this order any limitations-based defense that has matured since the commencement of this action;

c. Defendants have submitted within 40 days after the filing of this order an agreement binding them to satisfy any final judgment rendered in favor of Plaintiffs in a foreign court;

d. Defendants have complied with expedited discovery in the United States under the supervision of this Court within 90 days after this Order is filed;

e. Defendants have stipulated within 40 days after the filing of this order that any discovery conducted

during the pendency of this action may be used in any foreign proceeding to the same extent as if it had been conducted in proceedings there.

Any objections of Plaintiffs concerning the waivers, agreements, and stipulations pursuant to subparagraphs a., b., c. or e. above are to be filed within 50 days after the filing of this Order. Any reply to such objections will be filed within 60 days after the filing of this Order.

Furthermore, in the event that the highest court of any foreign country finally affirms the dismissal for lack of jurisdiction of any action commenced by a plaintiff in this action in his home country or the country in which he was injured, that plaintiff may return to this Court and, upon proper motion, the Court will resume jurisdiction over the action as if the action had not been dismissed on forum non conveniens grounds.

3. *Certain Defendants' Motion for Injunctive Relief*

Defendants motion for injunctive relief is DENIED.

D. *Pending Motions*

In addition to Plaintiffs' motions for remand and to strike and Defendants' motion to dismiss, a number of other motions are pending in this action. If this action is in fact dismissed in 90 days, all pending motions in this action not otherwise expressly addressed in this order will automatically be DENIED as MOOT.

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IT IS SO ORDERED.

DATED: Honolulu, Hawaii, September 9, 1998.

s/ Helen Gillmor
HELEN GILLMOR
United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITIONS FOR REHEARING DATED AND FILED JULY 10, 2001

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-16524

D.C. No. CV-97-01516-HG/BMK

GERARDO DENNIS PATRICKSON; RODOLFO BERMUDEZ ARIAS; BENIGNO TORRES HERNANDEZ; FERNANDO JIMENEZ ARIAS; SANTOS LEANDROS; HERMAN ROMERO AGUILAR; ELIAS ESPINOZA MERELO HOOKER ERA CELESTINO; ALIRIO MANUEL MENDEZ; CARLOS HUMBERTO RIVERA, individually and on behalf of others similarly situated,

Plaintiffs-Appellants,

v.

DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY; DOLE FRESH FRUIT INTERNATIONAL, LIMITED; PINEAPPLE GROWERS ASSOCIATION OF HAWAII; AMVAC CHEMICAL CORPORATION; SHELL OIL COMPANY; DOW CHEMICAL COMPANY; OCCIDENTAL CHEMICAL CORPORATION, individually and as successor to Occidental Chemical Company and Occidental Chemical Agricultural Products, Inc., Hooker Chemical and Plastics, Occidental Chemical Company of Texas and Best Fertilizer Company; STANDARD FRUIT CO.; STANDARD FRUIT & STEAMSHIP CO.;

Appendix F

STANDARD FRUIT COMPANY DE COSTA RICA, S.A.; STANDARD FRUIT COMPANY DE HONDURAS, S.A.; CHIQUITA BRANDS, INC.; CHIQUITA BRANDS INTERNATIONAL, INC., individually; UNITED BRANDS COMPANY, INC., suc Chiquita Brands International, Inc.; MARITROP TRADING CORPORATION; DEL MONTE FRESH PRODUCE, N.A.; DEL MONTE FRESH PRODUCE HAWAII, INC.; DEL MONTE FRESH PRODUCE COMPANY AND FRESH DEL MONTE N.V.,

Defendants-Appellees,

v.

DEAD SEA BROMINE CO., LTD.; BROMINE COMPOUNDS LIMITED,

Third-party-defendants-Appellees.

No. 99-16770

D.C. No. CV-97-01516-HG/BMK

GERARDO DENNIS PATRICKSON; RODOLFO BERMUDEZ ARIAS; BENIGNO TORRES HERNANDEZ; FERNANDO JIMENEZ ARIAS; SANTOS LEANDROS; HERMAN ROMERO AGUILAR; ELIAS ESPINOZA MERELO HOOKER ERA CELESTINO; ALIRIO MANUEL MENDEZ; CARLOS HUMBERTO RIVERA, individually and on behalf of others similarly situated,

Plaintiffs-Appellees,

v.

Appendix F

DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY; DOLE FRESH FRUIT INTERNATIONAL, LIMITED; PINEAPPLE GROWERS ASSOCIATION OF HAWAII; AMVAC CHEMICAL CORPORATION; SHELL OIL COMPANY; DOW CHEMICAL COMPANY; OCCIDENTAL CHEMICAL CORPORATION, individually and as successor to Occidental Chemical Company and Occidental Chemical Agricultural Products, Inc., Hooker Chemical and Plastics, Occidental Chemical Company of Texas and Best Fertilizer Company; STANDARD FRUIT CO.; STANDARD FRUIT & STEAMSHIP CO.; STANDARD FRUIT COMPANY DE COSTA RICA, S.A.; STANDARD FRUIT COMPANY DE HONDURAS, S.A.; CHIQUITA BRANDS, INC.; CHIQUITA BRANDS INTERNATIONAL, INC., individually; UNITED BRANDS COMPANY, INC., suc Chiquita Brands International, Inc.; MARITROP TRADING CORPORATION; DEL MONTE FRESH PRODUCE, N.A.; DEL MONTE FRESH PRODUCE HAWAII, INC.; DEL MONTE FRESH PRODUCE COMPANY and FRESH DEL MONTE N.V.,

Defendants-Appellees,

and

DEAD SEA BROMINE CO., LTD.; BROMINE COMPOUNDS LIMITED,

Third-party-defendants-Appellants.

Appendix F

Before: **KOZINSKI, GRABER** and **FISHER**, Circuit Judges.

The petitions for rehearing are denied. The full court has been advised of the petitions for rehearing en banc and, no judge having requested a vote thereon, the petitions for rehearing en banc are also denied. Fed. R. App. P. 35.

Nos. 01-593, 01-594

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DOLE FOOD CO., ET AL.,

Petitioners,

v.

GERALDO DENNIS PATRICKSON, ET AL.,

Respondents.

DEAD SEA BROMINE CO., LTD., ET AL.,

Petitioners,

v.

GERALDO DENNIS PATRICKSON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION

Respondents Geraldo Dennis Patrickson, Rodolfo Bermudez Arias, Benigno Torres Hernandez, Fernando Jiminez Arias, Santos Leandros, Herman Romero Aguilar, Elias Espinoza Merelo, Hooker Era Celestino, Alirio Manuel Mendez, and Carlos Humberto Rivera respectfully submit this consolidated Brief in Opposition to the Petitions for Writ of Certiorari in Nos. 01-593 and 01-594.

According to petitioners, this case presents a question concerning the scope of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11: Whether FSIA immunity extends to every subsidiary in a corporate chain, no matter how remote, so long as the subsidiary can be deemed to be majority-owned by a foreign state by means of a process of multiplying indirect shareholder stakes. In this case, the Ninth Circuit, per Kozinski, J., properly held that the FSIA's ownership test applies only to the first tier of direct corporate ownership by a foreign state.

There are four reasons that the Ninth Circuit's judgment is not suitable for this Court's review:

First, this Court denied review of the very same issue only very recently, on April 16, 2001, in *Delgado v. Shell Oil Co.*, No. 00-1316, 121 S. Ct. 1603 (2001). Tellingly, the respondents in *Delgado* were the very same parties who are petitioners here, represented by the very same counsel.[1] Yet in *Delgado* they urged this Court to *deny* review of the very same question they now present to this Court. Nothing that has happened since this Court denied review in *Delgado* makes the question presented any more worthy of this Court's review.

Second, this Court should deny review because any conflict among the lower courts with respect to the question presented would benefit immensely from additional percolation. For

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[1] By contrast, neither the respondents in this case nor their counsel were involved in the certiorari petition in *Delgado*.

example, the vast majority of the decisions addressing the question presented have been rendered by district courts rather than courts of appeals. Some circuits do not have settled views on the issue. For example, district courts in the Second, Third, and Fourth Circuits have expressed intra-circuit disagreement on the question. Although the Dole defendants claim that the Ninth Circuit's judgment below conflicts with decisions in four circuits, the Dead Sea Companies acknowledge that "the Fifth and Seventh Circuits are the only circuit courts [in addition to the Ninth] to have analyzed the issue at any length." Petition in No. 01-594 at 19.

Third, this Court should deny review because the case at bar is a particularly poor vehicle for addressing the question presented. It is undisputed that the government of Israel privatized its interest in the Dead Sea Companies beginning in the early 1990s and no longer owned, indirectly or otherwise, a majority of the shares in the Dead Sea Companies at the time of this litigation. Pet. App. 19a. As a result, the issue presented by the this case is not the FSIA question framed by petitioners but rather the separate question of whether FSIA immunity extends to an indirect subsidiary that was allegedly majority-owned by a foreign government at the time of the underlying wrongdoing supposedly giving rise to the litigation, but not at the time of the complaint or removal petition. In addition, there is a fraudulent joinder issue in this case that would prevent removal even if the Dead Sea Companies were deemed a foreign "state."

Fourth, this Court should deny review because the Ninth Circuit's interpretation of the FSIA is demonstrably correct.

STATEMENT

1. Background

On October 3, 1997, Plaintiffs commenced this action by filing a complaint in the Circuit Court of the First Circuit of the

State of Hawaii. Pet. App. 57a.[2] Plaintiffs' complaint, as amended on March 3, 1998, was filed by nine foreign Plaintiffs who are residents of the countries of Costa Rica, Ecuador, Guatemala, and Panama. Each of the Plaintiffs in these cases was injured while working on banana plantations in Latin America by a dangerous chemical that has been banned in the U.S. but that Defendants have continued to export. *Id.* at 4a.

Defendants caused Plaintiffs' injuries by exposing them, without their knowledge, to dibromochloropropane (DBCP), a pesticide used for controlling nematodes. DBCP causes male sterility, testicular atrophy, testicular and other cancers, miscarriages in women, mutation of sperm cells in men, damage to the liver and kidneys, and injury to retinal and corneal tissue. The U.S. Environmental Protection Agency (EPA) has identified DBCP as a probable human carcinogen. The National Cancer Institute (NCI) has described it as "one of the most potent known carcinogens." As early as 1958, an in-house toxicology report at Dow Chemical Co. concluded that DBCP was "readily absorbed through the skin and high in toxicity in inhalation." Dow's data also showed that "liver, lung and kidney effects might be expected" and that "testicular atrophy may result from prolonged, repeated exposure."

DBCP was widely used throughout Central America beginning in the 1960s without warnings, safety equipment, or precautions. Workers at banana plantations (including Plaintiffs) suffered from regular, heavy exposure to DBCP through vapor inhalation and skin absorption.

In July 1977, thirty-five of 114 male workers at Occidental's California DBCP manufacturing plant were found to be sterile. Almost immediately, EPA suspended all but a few uses of

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[2] Unless otherwise indicated, citations are to the appendix in No. 01-594, *Dead Sea Bromine Co. v. Patrickson*.

DBCP, for which heavy protective equipment was required (none of which was supplied to Plaintiffs). Despite this ban, U.S. companies continued to use DBCP in unsuspecting developing nations unchecked by export restrictions. Pet. App. 4a.

2. The Dead Sea Companies

The Dead Sea Companies were never owned directly by the Israeli government. Pet. App. 22a. Rather, "at all relevant times, the chain of ownership included intermediary corporations." *Id.* at 65a. Between 1968 and 1995, the Companies were second-tier, third-tier, or fourth-tier members of a corporate chain that was indirectly owned by the government. *Id.* For example, from 1970 to 1975, the State of Israel owned 99% of an entity named Dead Sea Works which in turn owned 99.9% of Dead Sea Bromine Co., Ltd. ("Dead Sea"). *Id.* Dead Sea owned 50% of Bromine Compounds Limited ("BCL"), and Dead Sea Works owned 25% of BCL. *Id.* After 1975, another entity was added to the chain of ownership when the State of Israel conveyed its ownership of Dead Sea Works to Israel Chemicals, Ltd., an Israeli corporation owned by the State of Israel. In short, "[a]ny ownership interest of Dead Sea and BCL claimed by the State of Israel was completely indirect at all relevant times." *Id.*

Moreover, in the early 1990s the government of Israel privatized the companies in question. "At the time suit was filed, Israel was only a minority shareholder of the Dead Sea Defendants." Pet. App. 62a.

The Dead Sea Companies claim to have had business relationships with the first-party Defendants in this case, and those Defendants have asserted a third-party claim against the Dead Sea Companies. Yet the Dead Sea Companies have never provided any evidence of when or where their DBCP was used (if ever), nor have they shown that any Plaintiff was exposed to their DBCP.

On October 31, 1997, the Dead Sea Companies filed their Petition for Removal. This Petition was allegedly premised on a third-party complaint filed two hours earlier on the same day by the Dole defendants against the Dead Sea Companies. Pet. App. 58a. The removal petition was filed despite clear and unambiguous disclaimers in Plaintiffs' complaint specifically denying claims for exposure to DBCP made by the Dead Sea Companies. In addition, the Dead Sea Companies have already settled the third-party claims and have denied any liability for contribution or indemnity claims.

3. The District Court's Decision

The district court denied the Dead Sea Companies' assertion of FSIA jurisdiction. In a memorandum opinion and order dated September 9, 1998, the court held that the Dead Sea Companies were not agencies or instrumentalities of Israel.

The court began by accepting Defendants' view that the proper time for ascertaining FSIA foreign state status is the time the alleged wrongdoing occurred. Pet. App. 62a-64a. But the court concluded that "Israel's indirect ownership of Dead Sea and BCL through several intermediary corporations does not qualify Dead Sea and BCL as agencies or instrumentalities of a foreign state pursuant to 28 U.S.C. § 1603(b)(2). Dead Sea and BCL are not entities whose majority of shares or other ownership interest are owned by a foreign state." *Id.* at 71a.

The district court reached this result through a straightforward application of the Ninth Circuit's decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.), *cert. denied*, 516 U.S. 869 (1995), and properly concluded that indirect ownership by a foreign state through subsidiary entities does not entitle a company to be considered an agency or instrumentality of a foreign state. The district court analyzed *Gates* in great detail, observing that it is "the most recent Ninth Circuit decision which discusses the requirements of agency or instrumentality

status." Pet. App. 65a. In *Gates*, the Ninth Circuit explained that the FSIA applies only to "entities that are either organs of a foreign state or political subdivision thereof or have a majority of shares owned by the foreign state or political subdivision," and it rejected the "tiering" theory that potential immunity could extend to "every subsidiary in a corporate chain, no matter how far down the line." 54 F.3d at 1462.

The district court further noted that subsequently, in *Corporacion Mexicana de Servicios Maritimos S.A. de C.V. v. M/T Respect*, 89 F.3d 650 (9th Cir. 1996), the Ninth Circuit reaffirmed the language from *Gates* and explained that: "the ownership test of § 1603(b)(2) applie[s] only to the first tier of ownership: an entity wholly owned by 'an agency or instrumentality of a foreign state' is not owned by 'a foreign state or a political subdivision thereof' and therefore does not meet the definition of § 1603(b)(2)." 89 F.3d at 655 (citation omitted).

The district court considered evidence submitted by the parties and found that "Dead Sea and BCL are commercial mining operations concerned with production, marketing, and profit." Pet. App. 78a. "The control maintained by the government was derived mainly from the government's indirect ownership of the entities." *Id.* "[T]he government's control is not derived from the need to play an active supervisory role over a government created entity." *Id.* The Dead Sea Companies "were not created by the government to fulfill a government mission." *Id.* Moreover, the district court noted that "the entities are not staffed solely with government employees and are not treated as agencies under Israeli law." *Id.*

Accordingly, the district court held that the Dead Sea Companies could not qualify as "agencies or instrumentalities" under the FSIA and that removal under the FSIA was improper. Because it reached this conclusion, the district court had no occasion to reach Plaintiffs' alternative argument that the Dead

Sea Companies had been fraudulently joined. Pet. App. 79a n.5.

On September 21, 1998, the Dead Sea Companies filed a reconsideration motion arguing that they were agencies or instrumentalities of Israel. Again, the district court carefully considered the Dead Sea Companies' argument and rejected it. The court explained that "Dead Sea has not alleged any facts or additional information that would allow the Court to change its decision. No intervening change in the law is argued and no new evidence has been produced." Pet. App. 53a.

4. The Court of Appeals' Decision

The Ninth Circuit affirmed the district court's holding with respect to the Dead Sea Companies, in a unanimous opinion authored by Judge Kozinski. Like the district court, the Ninth Circuit relied on a straightforward application of *Gates*: "Because the Dead Sea Companies were never owned directly by the Israeli government, *Gates* would seem to foreclose their claim to be instrumentalities through stock ownership." Pet. App. 22a. "*Gates* decided this question, and we are bound by its authority." *Id.* at 24a.

The Ninth Circuit also observed that "the Dead Sea Companies were not run by government appointees; their employees were not treated as civil servants; nor were the Companies wholly owned by the government of Israel." *Id.* at 25a-26a. "These factors support the district court's view of the Companies as independent commercial enterprises, heavily regulated, but acting to maximize profits rather than pursue public objectives." *Id.* at 26a.

REASONS FOR DENYING THE WRIT

A. This Court Recently Denied Certiorari in *Delgado*

The same FSIA question presented here was the subject of a petition for certiorari in *Delgado v. Shell Oil Co.*, No. 00-1316, 121 S. Ct. 1603 (2001), which involved DBCP lawsuits against

the same defendants (including the Dead Sea Companies), represented by the same counsel. On April 16, 2001, this Court denied review in *Delgado*. Nothing has changed in the interim to warrant this Court's review of the FSIA question.

The only difference between *Delgado* and this case is that the Fifth Circuit ruled in defendants' favor in *Delgado*, and accordingly defendants opposed certiorari in that case. Yet the arguments made by defendants in *Delgado* contradict their arguments in favor of certiorari here. In *Delgado*, for example, the Dead Sea Companies contended that there was no circuit split warranting this Court's review. Br. in Opp. of Resp. Dead Sea Bromine Co., et al., in No. 00-1316, at 4 ("[T]he Fifth Circuit's decision does not create a split with the Ninth Circuit's decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.) ('*Gates*'), *cert. denied sub nom.*, 516 U.S. 869 (1995)."); *id.* at 5 ("Although several district courts have indicated that they perceive a split between the Ninth Circuit's decision in *Gates* and one aspect of the Seventh Circuit's interpretation of the FSIA in *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932, 939-41 (7th Cir. 1996) ('*Air Crash*'), the specific FSIA issue as to which the Ninth and Seventh Circuits appear to disagree is not presented by Dead Sea Bromine's claim to FSIA status."). In *Delgado*, the Dole defendants similarly insisted that "there is no conflict between the decision below and *Gates*." Br. in Opp. of Resp. Dole Defendants in No. 00-1316, at 9.

As the Ninth Circuit observed in this case, its decision below is a straightforward application of its prior opinion in *Gates*. *See* Pet. App. 22a ("Because the Dead Sea Companies were never owned directly by the Israeli government, *Gates* would seem to foreclose their claim to be instrumentalities through stock ownership."); *id.* at 23a (Dead Sea's argument is "foreclosed by *Gates*"); *id.* ("*Gate's* holding covers the Israeli government's interest in the Dead Sea Companies"); *id.* at 24a ("*Gates* decided this question, and we are bound by its authority"). The decision below, which relies entirely on *Gates*, does not break any new

ground requiring this Court's review. Accordingly, the defendants' argument against review in *Delgado* cannot be squared with their petitions for certiorari here.

Moreover, in *Delgado* the Dole defendants insisted that "both practical and policy considerations weigh against granting certiorari and prolonging this already protracted case even further." Br. in Opp. of Resp. Dole Defendants in No. 00-1316, at 9. The same reasoning strongly supports denial of certiorari here. This case was filed more than four years ago in Hawaii state court. Pet. App. 57a. Since that time, the plaintiffs have not been afforded any proceedings of substance on the merits of their claims, in either state or federal court. Instead, the defendants have delayed meaningful justice through a flurry of jurisdictional, procedural, and other motions. It is long past time when this case should have gone to trial. This Court should promptly deny review and allow the Hawaii state courts to proceed with this case on remand.

At stake not only is justice for these plaintiffs. The integrity of this Court's certiorari process is also implicated here. Defendants' arguments against review in *Delgado* contradict their petitions for certiorari here. "Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram v. Herdich*, 530 U.S. 211, 227 n.8 (2000). This elementary principle requires the denial of the petitions at bar.

B. The Issue Should Percolate Further in the Lower Courts

Petitioners' claim of an extensive circuit split is greatly exaggerated. In fact, the Dead Sea Companies (in No. 01-594) and the Dole defendants (in No. 01-593) do not even among themselves as to the extent of the disagreement in the lower courts. The Dole defendants claim that the decision of the Ninth Circuit below "conflicts with the decisions of at least four other

courts of appeals." Petition in No. 01-593, at 11. Yet the Dead Sea Companies acknowledge that "the Fifth and Seventh Circuits are the only circuit courts [in addition to the Ninth] to have analyzed the issue at any length." Petition in No. 01-594 at 19. And the Dead Sea Companies make that assertion even though their Brief in Opposition in *Delgado* argued precisely the opposite and demonstrated that there was *no* conflict among the Fifth Circuit's decision in *Delgado*, the Seventh Circuit's decision in *Air Crash*, and Ninth Circuit's decision in *Gates*, which the court of appeals below merely reaffirmed. *See* Br. in Opp. of Resp. Dead Sea Bromine Co., et al., in No. 00-1316, at 4-5, 12-14 (arguing that there was no conflict among the Fifth, Seventh, and Ninth Circuits).

The Dole defendants inflate their claim of a circuit split by including in their list of supposedly conflicting cases the Sixth Circuit's decision in *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988), and the D.C. Circuit's decision in *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982) – even though neither the Sixth Circuit nor the D.C. Circuit expressly addressed the FSIA question presented by this case. Those courts simply assumed, without analysis, that indirectly owned corporate subsidiaries could qualify for FSIA immunity. Hence, the decisions in *Gould* and *Gilson* cannot be said to conflict with the judgment of the Ninth Circuit in this case. Nor can any genuine conflict be deemed to exist based on other decisions cited by the Dole defendants in which courts assumed that indirectly owned corporations could qualify for FSIA immunity or in which the parties did not raise the issue. *See* Dole Petition in No. 01-593, at 13-14 (citing cases in which the parties did not place the question in dispute).

As the Dole defendants argued in successfully opposing certiorari in *Delgado*, any conflicts in the lower courts "may work themselves out as the courts of appeals address the question of indirect ownership." Br. in Opp. of Resp. Dole Defendants in No. 00-1316, at 15. The reality is that the overwhelming

majority of the cases addressing the FSIA question presented have been district court decisions rather than opinions by the courts of appeals. *See* Dead Sea Petition in No. 01-594, at 12-14 (citing two decisions by the courts of appeals and ten decisions by the district courts).

It is clear that the matter would benefit enormously from further percolation. As the Dead Sea Companies' Petition reveals, district courts in the Second, Third, and Fourth Circuits have reached different conclusions regarding the FSIA question presented. *Compare* Dead Sea Petition in No. 01-594, at 12-14, with *id.* at 16. Hence, those circuits have not yet adopted a consistent position on the FSIA question. If the petitioners are right that the FSIA question is an important and recurring one, then there will be additional opportunities for the courts of appeals to address the question and further opportunities for this Court to resolve any resulting conflicts among the circuits.

C. This Case Is An Unsuitable Vehicle To Review the Question Presented.

Even if the question presented were worthy of this Court's review, this Court should deny certiorari because the case at bar is a particularly poor vehicle for addressing the question presented.

The Dead Sea Companies are atypical FSIA subsidiaries because they were *not* majority owned by the State of Israel – either directly *or* indirectly – when the suit was filed in Hawaii state court on October 3, 1997 or when the case was removed to federal court later that month. Pet. App. 62a. Rather, the State of Israel unwound its indirect investment in the Dead Sea Companies in the early 1990s. As the Ninth Circuit explained, "[t]he Israeli government privatized most of its holdings in Israel Chemicals Limited during the 1990s and so, by the time this suit was filed in 1997, the govemment no longer owned, indirectly or otherwise, a majority of the shares in the Dead Sea Companies." Pet. App. 19a. As a result, the issue presented by the specific

circumstances of this case is not the FSIA question framed by petitioners but rather the question of whether FSIA immunity extends to an indirect subsidiary that was allegedly majority-owned by a foreign government not at the time of the complaint or removal petition but only at the time of the underlying wrongdoing giving rise to the litigation. In the words of the Ninth Circuit, "[d]oes the FSIA apply to companies that were owned by the state at the time of the allegedly tortious conduct, but have since been cut free?" *Id.*

By itself, the fact that the Dead Sea Companies are not typical FSIA subsidiaries would be enough to deny certiorari. The problem is compounded by the Ninth Circuit's recognition that there is a "plausible basis for concluding that the FSIA does not come into play where a suit is brought against a private entity that was a foreign state at the time of the alleged wrongdoing, but is no longer." Pet. App. 21a. The FSIA is not ambiguous. The FSIA repeatedly uses the present tense in defining an "agency or instrumentality of a foreign state" as an entity "which *is* a separate legal person"; "which *is* an organ of a foreign state or political subdivision thereof, or a majority of whose shares . . . *is* owned by a foreign state or political subdivision thereof," and "which *is* neither a citizen of a State . . . nor created under the laws of any third country." 28 U.S.C. § 1603 (emphasis added). As the Ninth Circuit observed, "[b]y its terms, the FSIA applies only to an entity that 'is' a foreign state at the time of the suit." Pet. App. 20a (quoting 28 U.S.C. § 1603(b)(2)). "The statute does not say that it applies to an entity that used to be a state, although Congress could easily have said so." *Id.* "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992) (deriving the meaning of the statute from Congress' use of "verbs in the past and present perfect tenses") (citations omitted).

Moreover, the FSIA "contains special rules for service of process on the foreign state, § 1608, and for enforcing a

judgment against the foreign state, §§ 1609-10," Pet. App. 20a – provisions that make sense only if the entity being sued is a foreign state at the time of suit. The Ninth Circuit concluded: "We have no doubt that, in enacting the FSIA, Congress had in mind suits brought against entities that are currently foreign states." *Id.* Thus, it seems clear that, even if indirect subsidiaries would generally be entitled to immunity under the FSIA, the Dead Sea Companies are *not* protected by the FSIA. In any event, the mere uncertainty over that issue is enough to deny certiorari of the question presented by petitioners.

In addition, there is a further reason that this case is an inappropriate vehicle for addressing the question presented: the Dead Sea Companies were fraudulently joined to the litigation and the FSIA cannot serve as a basis for removal in this case – regardless of the outcome of the question presented. The Plaintiffs were not exposed to products manufactured by the Dead Sea Companies and made clear, to a legal certainty, that they could not legally recover any damages from the Dead Sea Companies. The Plaintiffs, in their complaint, specifically disavowed any intention to seek recovery for any exposure to DBCP manufactured by the Dead Sea Companies:

> Plaintiffs do not assert any claims, do not seek any damages, and expressly disclaim any recovery for any injuries arising out of exposure to DBCP or products containing DBCP designed, manufactured, marketed, or supplied by Dead Sea Bromine Co., Ltd., Ameribrom Inc., Bromine Compounds, Ltd., Israel Chemical Co., Ltd., Dead Sea Works, Ltd., Makhteshim Azan, the State of Israel, or any other foreign sovereign entity.
>
> No Plaintiff in this action claims exposure to DBCP manufactured, sold, distributed, supplied, or designed by Dead Sea Bromine, Co., Ltd., Ameribrom Inc., Bromine Compounds, Ltd., Israel Chemical Co., Ltd., Dead Sea Works, Ltd., Makhteshim Azan, the State of Israel

> (collectively "Dead Sea"), or any other foreign sovereign entity. Discovery in other DBCP cases has shown conclusively that no Dead Sea DBCP product was ever used by Defendants Chiquita Brands, Inc., Chiquita Brands International, Inc., or Del Monte Fresh Produce, N.A., or their affiliates, and that no such product was used by Defendant Standard Fruit Company or its affiliates prior to 1975. Accordingly, any plaintiff who did not work for Standard Fruit Company or its affiliates after 1975 has no possibility of exposure to any Dead Sea product. Any Plaintiff who worked for Standard Fruit Company or its affiliates specifically and affirmatively disclaims any right to recovery for such exposure.

Complaint at ¶¶ 23; 24. In each cause of action in the complaint against the Defendants, the Plaintiffs specifically repeated that the Plaintiffs "assert [such] claims against only those Defendants named in this Complaint." The district court did not need to reach the fraudulent joinder issue because it found that the Dead Sea Companies were not entitled to FSIA immunity in any event. Pet. App. 79a n.5. Yet it could not be clearer that the Plaintiffs, to a legal certainty, have no right to recovery against the Dead Sea Companies.

In their brief before the Ninth Circuit, the Dead Sea Companies stated that they have already resolved any third-party claims against them by the Dole defendants or other parties, so that there is no possibility of indemnity or contribution claims against the Dead Sea Companies. *See* Reply Br. of Dead Sea Companies at 27 n.1.

In short, nothing in this case could affect the liability of the Dead Sea Companies. It is clear from defendants' procedural machinations that the Dead Sea Companies have been fraudulently joined in a blatant effort to obtain federal jurisdiction. On October 31, 1997, the Dead Sea Companies filed their Petition in the United States District Court, with

lengthy attached documentation, at 2:00 p.m., little more than two hours after the Dole defendants filed the third-party complaint. Thereafter, the Dead Sea Companies filed their notices of removal in state court on October 31, 1997 at 2:01 p.m. and at 2:12 p.m. The defendants colluded in carefully choreographing the fraudulent joinder of the Dead Sea Companies in order to obtain a federal forum.

The fraudulent joinder issue provides yet another reason to deny certiorari.

D. The Ninth Circuit's Interpretation of the FSIA Is Demonstrably Correct.

Review should be denied for the further reason that the Ninth Circuit's interpretation of the FSIA is entirely proper. Section 1603(b)(2) requires that a corporation attempting to invoke the benefits of the FSIA by qualifying as an "agency or instrumentality of a foreign state" must have a majority of its shares owned by "a foreign state or political subdivision thereof." Thus, the *only* shares of a corporation (here, the Dead Sea Companies) that count toward the majority-ownership requirement of Section 1603(b)(2) are those shares held by the foreign state itself (here, for example, the Government of Israel) or by its political subdivisions. Shares of a corporation such as Dead Sea that are owned *not* by "a foreign state or political subdivision thereof," but instead by *another corporation* (which is the case here), do not count — even if the parent corporation happens to be the instrumentality of a foreign state or political division thereof because a majority of *its own shares* are owned by that foreign state or political subdivision. The plain language of Section 1603(b)(2) requires this result because it fails to list as relevant under Section 1603(b)(2) shares that are merely held by *instrumentalities* of foreign states.

The FSIA provides that a foreign state "*includes*" an agency or instrumentality, § 1603(a), not that it *is* an agency or instrumentality or that it *is defined as* an agency or

instrumentality. The primary definitions of the word "include" support this commonsense view. *See Webster's Third New International Dictionary of the English Language Unabridged* 1143 (3d ed. 1986) ("include": "to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate"). Section 1603(a)'s "includes" language does not authorize the conclusion that a corporation that happens to be an instrumentality of a foreign state actually *is* a foreign state, so as to permit infinite "tiering" under Section 1603(b)(2).

Moreover, the meaning of the term "foreign state" in Section 1603(b)(2) is necessarily quite narrow because, by definition, it can only mean an entity that is *capable* of having "a political subdivision thereof." § 1603(a). Just as obviously, if the term "foreign state" in Section 1603(b)(2) were construed as meaning, from the very beginning, everything listed in Section 1603(a), then political subdivisions would already be encompassed in the term and the reference in Section 1603(b)(2) would become superfluous, in violation of well-accepted principles of statutory construction.

The Dead Sea Companies concede that the government of Israel has never owned a majority of their stock, but they contend that indirect tiering arrangements are a form of "other ownership interests" for purposes of § 1603(b)(2). Dead Sea Petition, in No. 01-594 at 20. They urge this Court to look beyond "corporate form" and focus on effective "control[]." *Id.* at 21, 22. This is not the test enacted by Congress. The FSIA could have prescribed a test based on "direct or indirect" ownership or "control." But it did not. Instead, Congress in the FSIA was exceedingly conscious of the distinction between foreign states, political subdivisions, and agencies or instrumentalities of foreign states and political subdivisions. As the Ninth Circuit held, Pet. App. 23a, Section 1603(b)(2)'s reference to "other ownership interests" is plainly not a reference to forms of indirect, inchoate means of corporate control, but to forms of securities like stock, such as convertible bonds, partnership

interests, fractional interests in leases or assets, and the like. The Dead Sea Companies ignore the principle of *ejusdem generis*, under which the phrase "other ownership interests" must be construed with an eye to the example of "shares" provided by Congress.

If there were any doubt on the matter, a narrow view of the FSIA is required by the established rule that federal jurisdictional statutes should be construed narrowly. *See Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).

There are also important pragmatic concerns. The Ninth Circuit's interpretation of the FSIA creates a bright-line rule requiring direct ownership that avoids the need to consider lengthy chains of corporate ownership and to resolve potentially complex factual disputes over respective shareholder ownership percentages. In many cases, such inquiries will require extensive discovery, evidentiary hearings, and even consideration of foreign corporate law. The Ninth Circuit's approach offers a much simpler and more judicially administrable test.

This case illustrates the practical problems with the Dead Sea Companies' construction of the FSIA. The Dead Sea Companies have a complex and tortuous corporate history that would generate significant judicial burdens in the event of factual disputes.[3] The Dead Sea Companies themselves admit that the

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[3] From approximately 1965 to 1975, the parent corporation of the subsidiaries who are sued as defendants, Defendants Dead Sea Bromine Co., Ltd. ("Dead Sea") and Bromine Compounds Limited ("BCL"), was a company called Dead Sea Works, Ltd. Through various stock transfers over the years, this parent itself became a subsidiary to another corporation. Defendant BCL was itself a subsidiary of Dead Sea and therefore a lower tier subsidiary of Dead Sea Works, Ltd.

From 1965 to 1966, the State of Israel owned approximately 45% of Dead Sea Works, Ltd. By 1967, Israel increased its ownership to approximately 98%. SER 750. From 1968 to 1975, Israel owned approximately 99% of the shares in The Works. In 1975, Israel conveyed all of its shares in Dead Sea Works to Israel Chemical, Ltd. ("ICL"). *Id.* Thus,

percentages of the Israeli government's indirect ownership interest have "fluctuated" over the years. Dead Sea Petition, in No. 01-594, at 7. This example illustrates the superiority of the Ninth Circuit's approach, which imposes a bright-line requirement of direct ownership and obviates the need to trace

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ICL became the new parent and Dead Sea Works a second-tier subsidiary.

From 1975 to 1977, ICL owned approximately 98% of the shares in Dead Sea Works. By 1983, ICL had reduced its ownership to 88% of Dead Sea Works shares. *Id.* Until 1995 ICL was owned by Israel when Israel divested itself of its majority ownership.

Defendant Dead Sea was incorporated in 1955 under the laws of Israel. SER 738. From 1965 to 1986, all of the shares of Dead Sea were owned by The Works, except for one share which was owned by Israel. SER 754. In 1986, this one share of Dead Sea was transferred to ICL and four ICL subsidiaries to be held in trust for Dead Sea Works. Dead Sea Works continued to own the remaining shares of Dead Sea. *Id.* In or about February, 1992 Israel converted its one share of ordinary stock into one share of special state stock.

In February 1995, Dead Sea Works distributed all of its shares of Dead Sea to its own shareholders. Dead Sea was then owned by ICL and the public, with 89% and 11% held respectively. *Id.* Thus, Dead Sea at all times was a second or third-tier subsidiary of Dead Sea Works or ICL.

Defendant BCL was incorporated under the Laws of Israel in 1961. From 1965 to 1969, Dead Sea owned 50% of the ordinary shares and one management share of BCL. The remaining 50% of BCL was owned in equal shares by two separate unrelated corporate entities. *Id.* In late 1969 or early 1970, Dead Sea Works acquired 25% of the ordinary shares of BCL from one of the separate unrelated corporate entities. *Id.* From late 1969 or early 1970 to 1981, Dead Sea owned 50% of the ordinary shares and one management share of BCL. Dead Sea Works owned 25% of the ordinary shares of BCL and the remaining 25% of ordinary shares were owned by an unrelated entity, Makhteshim, a New York corporation which sold pesticides in the United States. *Id.*

In 1981, Makhteshim transferred its 25% of ordinary shares to Dead Sea Works. BCL's ordinary shares were owned equally by Dead Sea Works and Dead Sea. *Id.* In 1984, Dead Sea Works transferred all of its shares to Dead Sea and Dead Sea transferred one share to ICL. *Id.* In 1992, Israel acquired one special state share in BCL. *Id.* Thus, beginning in 1986, BCL was a wholly owned subsidiary of Dead Sea and therefore a third and fourth-tier subsidiary under the parents Dead Sea Works and then ICL. *Id.*

indirect shareholder interests as they change over time in complex corporate transactions.

CONCLUSION

The petitions for certiorari should be denied.

Respectfully submitted.

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No. 01-594

IN THE

Supreme Court of the United States

DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at pages *ii-iii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Dead Sea Bromine Company Ltd. ("Dead Sea Bromine") and Bromine Compounds Limited (collectively, the "Dead Sea Companies" or the "Companies") submit this reply to the Brief in Opposition to Petition for a Writ of Certiorari ("Opposition Brief") of the respondents, Geraldo Dennis Patrickson, et al. (the "Respondents"), who proffer four reasons why certiorari should not be granted. None can withstand analysis.

1. The Existence of a Circuit Split Was Clearly Established By The Ninth Circuit's Decision Below, After This Court's Denial of Certiorari in *Delgado*.

Respondents contend that since the date of this Court's denial of certiorari in *Delgado v. Shell Oil Co., et al.*, 231 F.3d 165 (5th Cir. 2000), *cert. denied*, No. 00-1316, 121 S. Ct. 1603 (2001) ("*Delgado*"), "[n]othing has changed . . . to warrant this Court's review of the FSIA question." Opposition Brief at 8. They additionally assert that the Dead Sea Companies' arguments against certiorari in *Delgado* contradict the Companies' position in this case. *Id.* at 8-9. They are wrong on both counts. It was the Ninth Circuit's decision in this case that clearly framed the conflict among the circuit courts, and that decision was handed down after this Court denied certiorari in *Delgado*.

The question on which certiorari was sought in *Delgado* was the same as the question here at issue. In that case, the Dead Sea Companies had been held by the Fifth Circuit to be agencies or instrumentalities of Israel under the Foreign Sovereign Immunities Act ("FSIA" or the "Act") by virtue of Israel's ownership of a majority interest in the Companies through a tiered corporate structure. The *Delgado* plaintiffs argued that certiorari was appropriate because of an alleged split of authority between the Fifth Circuit's decision and the decision of the Ninth Circuit in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.), *cert. denied* 516 U.S. 869 (1995) ("*Gates*").

The Dead Sea Companies opposed certiorari in *Delgado* on the ground that it was premature to conclude that a circuit split existed. The Companies argued that the Ninth Circuit's decision in *Gates* was distinguishable from *Delgado*. Moreover, they pointed out that the very issue was then pending before the Ninth Circuit in the appeal in this case and urged that in the absence of a ruling on the appeal, which would necessarily require an interpretation of *Gates*, it was not clear whether there was any circuit split to be resolved. *Delgado v. Shell Oil Co.*, No. 00-1316, Brief In Opposition for Respondents Dead Sea Bromine Company Ltd., et al. at 4-5, 7-12.

After this Court's denial of certiorari in *Delgado*, the Ninth Circuit issued its ruling in this case. The court rejected the Companies' effort to distinguish *Gates*, definitively interpreted the holding of that case as it applies to the State of Israel's indirect ownership of a majority interest in the Dead Sea Companies, and explicitly articulated the Ninth Circuit's disagreement with the conclusions of both the Fifth and Seventh Circuits in *Delgado* and *In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932 (7th Cir. 1996) ("*Air Crash*"). A.22-24.

What has changed since the Dead Sea Companies opposed certiorari in *Delgado* is that, with the ruling below, the Ninth Circuit has now rejected the Companies' contention that *Gates* is distinguishable and clearly enunciated a direct and explicit conflict between its interpretation of the statutory language at issue and that of at least two other circuit courts of appeal.[1] The Dead Sea Companies' position before this Court in *Delgado* and in this case are entirely consistent. The issue was unripe for

1. The Ninth Circuit also alluded to a conflict on the point with the decision of the Sixth Circuit in *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 448-50 (6th Cir. 1988). As demonstrated in the Companies' Petition for a Writ of Certiorari ("Dead Sea Companies' Petition") and *infra*, the holding of the court below is inconsistent with the results reflected in more than a dozen other circuit court decisions, as well.

this Court's review on the petition for certiorari in *Delgado* because it was unclear at that time whether, in fact, any conflict among the circuits existed. In the wake of the ruling of the Ninth Circuit below, the existence of a conflict could not be more stark.[2]

2. There Is No Benefit To Be Gained From Allowing The Issue to Percolate Further In The Lower Courts.

The Dead Sea Companies and the defendants in this litigation have amply demonstrated in their respective Petitions for Certiorari[3] that the question at issue is one that arises frequently, has been examined by several circuit courts and numerous district courts, and has been resolved differently, on differing rationales. The issue has arisen or been presented by the facts in no fewer than forty cases. *See* Dead Sea Companies' Petition at 12-16. When inconsistent Ninth Circuit precedent is included in the count, some fifteen Circuit Court decisions have, contrary to the decision below, accepted tiered ownership as sufficient to create agency or instrumentality status under the statute. *See id.* There are now at least twelve district court decisions

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2. Respondents' argument is built on an exercise in false logic. They contend that, in opposing certiorari in *Delgado*, the Dead Sea Companies argued there was no conflict between *Gates* and *Delgado*; that in its decision below the Ninth said it was just following *Gates*; and, therefore, that the Dead Sea Companies cannot now contend there is a conflict between *Gates* and *Delgado*. Quite obviously, however, the argument that there was no conflict between *Gates* and *Delgado* rested on an interpretation of *Gates* that was urged upon the Ninth Circuit on the appeal below but definitively rejected in the decision in this case.

3. In *Dole Food Co. et al. v. Gerardo Dennis Patrickson, et al.*, No. 01-593, the defendants have filed an independent petition for certiorari in this case on the FSIA status of the Dead Sea Companies, who are third-party defendants in the case.

that have examined the permissibility of tiering under the Act. *See* Dead Sea Companies' Petition at 12-14; *Musopole v. South African Airways*, 2001 WL 1329196 (S.D.N.Y. Oct. 29, 2001); *Delgado*, 890 F. Supp. 1315, 1318 n.5 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165. Although a majority permit it, at least five, inspired largely by the reasoning expressed in the *Gates* decision, have concluded that tiering is prohibited. *See* Dead Sea Companies' Petition at 16.

Despite this array of conflicting precedents, respondents assert "that the matter would benefit enormously from further percolation." Opposition Brief at 11. They point to the fact that district courts in three circuits "have reached different conclusions" and that the "majority of the cases addressing the FSIA question presented have been district court decisions rather than opinions by the courts of appeals." *Id.* However, the frequency with which the issue arises at the district court level and the absence of a consensus between and within several circuits only highlight the need for this Court's review. There is no reason to believe that continuing judicial disarray on this important jurisdictional point will serve to clarify the law or point the way to an enlightened result, or that the issue will fade away. Indeed, that the confusion in existing caselaw concerns subject matter jurisdiction makes the need for resolution by this Court all the more compelling. *See, e.g., Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202 (1988) (rules having jurisdictional consequences "should above all be clear"); *Kennedy v. Wright*, 851 F.2d 963, 967 (7th Cir. 1988) (citing numerous cases that "stress the importance of simple rules that conserve the time that courts and counsel must devote to jurisdictional questions, so that more time is available to deal with the merits"); *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987) ("The more mechanical the application of a jurisdictional rule, the better. The chief and often the only virtue of a jurisdictional rule is clarity.") (citations omitted). The arguments for and against possible constructions of the

statute have been articulated, adopted and/or rejected, numerous times. The issues have also been discussed and vetted in scholarly journals and other legal writings. *See* Dead Sea Companies' Petition at 19 n.5. In the meantime, numerous entities that are indirectly majority owned by foreign sovereign states, whose interests, by any reckoning, are closely intertwined with the interests of those states, face uncertainty and inconsistent results concerning the fundamental issue whether the protections of the FSIA apply. A basic goal of this statute — uniformity among federal courts on issues and interests implicated by the FSIA — can be achieved at this point only by a ruling from this Court.

3. This Case Presents a Particularly Suitable Vehicle to Review the Ownership Issue.

It is difficult to imagine a case that could present a clearer or cleaner record to review the tiering issue than this case. The material facts concerning the State of Israel's ownership interest in the Dead Sea Companies are not complicated and the State's indirect majority interest in the Companies is undisputed.[4] The court below held that because the State did not directly own their shares of stock, the Companies are not instrumentalities of Israel and, accordingly, that it lacked jurisdiction over the action. A.22-24. On the basis of the same facts, the Fifth Circuit Court of Appeals has come to precisely the opposite conclusion, sustaining federal jurisdiction over several actions that are virtually identical to this case. *Delgado*, 231 F.3d at 176 (5th Cir. 2000).

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4. Until 1975, the State of Israel owned substantially all of Dead Sea Works Inc. ("Works"), which in turn owned substantially all of Dead Sea Bromine. In 1975 the State transferred its direct share ownership from Works to Israel Chemicals Ltd. ("ICL"), and for the next fifteen years ICL owned almost all of Works, and Works continued to own almost all of Dead Sea Bromine. In this same period, Bromine Compounds Limited was a subsidiary of Dead Sea Bromine. *See* Dead Sea Companies' Petition at 6-7.

As things now stand, the Dead Sea Companies, and numerous others which, like them, were or are owned and controlled by foreign sovereign states through one or more intervening corporate entities, are instrumentalities of a foreign state within the meaning of the FSIA if sued in the Fifth or Seventh Circuits, but are ordinary corporate parties in the Ninth Circuit. In the D.C., Second and Sixth Circuits, they have compelling arguments that they are within the scope of the FSIA, *see Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 (D.C. Cir. 1982), *on remand*, 606 F. Supp. 38 (D.D.C. 1984), *aff'd*, 787 F.2d 655 (D.C. Cir. 1986); *Reiss v. Societe Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 746 (2d Cir. 2000); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 448-50 (6th Cir. 1988); but, as in other circuits, they are ultimately subject to great uncertainty based on the divergence of case law at the district court level. Only a decision of this Court can resolve this uncertainty once and for all.

The case is all the more suitable for review in light of the nature and importance of the issue at stake. The FSIA is a significant enactment in which Congress addressed sensitive and unique issues that come into play when legal claims are asserted in courts of the United States against sovereign states and entities closely related to sovereign states. One of the main purposes of the Act was to make uniform the rules by which claims against such entities may be judicially resolved, and it did this, among other things, by establishing a broad right of access to federal court for the adjudication of all such claims. The lengthy list of cases cited in the briefs of all sides in this dispute that involve entities indirectly owned by foreign sovereigns substantiates that a large number of sovereign states have chosen to engage in a wide variety of enterprises through tiered corporate holdings.[5] Equally plainly, the rank confusion

5. That many if not all of these enterprises are commercial in nature was understood and anticipated by Congress, which provided that, although sovereign-related entities faced with legal claims as a (Cont'd)

that currently exists among the conflicting circuit and district court decisions seriously undermines the goals of uniformity and consistency that the Act was designed to achieve.

Respondents' contention that the case is unsuitable for review because of the existence — and rejection by the courts below — of certain other arguments is a canard. They argue, first, that the Companies are "not typical FSIA subsidiaries" because the State of Israel has divested itself of a majority ownership interest in the Companies before the complaint was filed. Opposition Brief at 12. There is nothing in the record of this case that in any way substantiates or even addresses the contention that the Companies' evolution away from majority state ownership in the 1990's makes them typical or atypical of similarly state-owned entities throughout the world. More importantly, however, as noted by the Ninth Circuit in the decision below, every court that has considered the issue has held that the FSIA applies to an entity that was an instrumentality of a foreign state at the time of the acts giving rise to the claim, even if the state did not continue to hold its majority ownership interest at the time of suit. A.19-20; *see* Dead Sea Companies' Petition at 8 n.3.[6] In the face of these significant and uniform precedents, there is no legal basis for the Respondents' assertion that, even if tiered ownership were generally permissible under the FSIA, the Dead Sea Companies would be outside the scope of the Act due to the State of Israel's recent divestiture of its majority holdings. Opposition Brief at 13. The fact

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(Cont'd)
result of such activities would often not enjoy immunity from liability, they would nevertheless be accorded broad access to a federal forum and protection from jury trials. *See* H.R. Rep. No. 94-1487 at 16; 28 U.S.C. §§ 1330(a), 1441(d), 1605(a).

6. *But cf. Ocasek v. Flintkote Co.*, 796 F. Supp. 362, 365 (N.D. Ill. 1992).

that this argument has been raised in this case has no bearing on the importance of the indirect ownership issue, or its ripeness for review and resolution by this Court.

Respondents' "fraudulent joinder" argument is based on a gross distortion. The issue Respondents attempt to inject into the analysis has nothing to do with the fraudulent joinder doctrine, which arises in the context of attempts to defeat federal jurisdiction, not to create it. *See, e.g.*, 15 Moore's Federal Practice § 102.21[5][a], at 102-55 (3d ed. 1998). Rather, Respondents point to the fact that their complaint in this case expressly disclaims any attempt to recover from the defendants for damages that may have been caused by the Dead Sea Companies' product and argue that the disclaimer vitiates the third-party claim asserted against the Companies. They go on to insinuate that, because the Companies are thus presented with a claim that is lacking in merit, it was somehow "fraudulent" for the Companies to invoke the jurisdiction of the federal courts as a forum to adjudicate the claim asserted against them.

As explained to the courts below, the Companies agree that the disclaimers in the plaintiffs' complaint undermine the third-party pleading that defendant Dole Food Company ("Dole") asserted against the Dead Sea Companies. That, of course, is a question of law,[7] which can and very possibly will be the subject of a motion to dismiss or for summary judgment at some appropriate future point in the litigation. Respondents can cite no authority, however, for the proposition that upon receipt of Dole's third-party complaint, the Companies were required to refrain from filing a notice of removal and, instead, litigate the

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7. It is anticipated that in response to such an argument, Dole would argue, as it did in the district court below, that the disclaimer in plaintiffs' complaint does not prevent Dole from seeking contribution from the Companies under the laws of the plaintiffs' home countries or under the law of Hawaii. *See* Defendants' Joint Memorandum In Opposition to Plaintiffs' Motion to Remand, dated March 19, 1998, at 22-26.

validity of the claim against them in state court. As agencies or instrumentalities of Israel, the Dead Sea Companies are entitled to litigate the validity of any claim asserted against them in a federal court, once preliminary issues of jurisdiction and venue have been resolved. This issue, too, has nothing at all to do with the suitability of this case to resolve the explicit circuit conflict over the indirect ownership issue that is squarely presented.[8]

4. The Ninth Circuit's Decision Was Incorrect.

The Dead Sea Companies have already summarized why the decision of the Ninth Circuit below was incorrect and should be reviewed by this Court. Dead Sea Companies' Petition at 20-23. Not surprisingly, Respondents argue that the decision below was correctly decided. Opposition Brief at 15-19. Whoever is right on this score, the argument for granting review is just as strong. The issue presented in this case is extremely important. It frames the scope and reach of the FSIA, a major Congressional enactment designed to address sensitive and complex issues of foreign relations that arise when claims are asserted against enterprises owned and controlled by foreign states; it is an issue that affects the legal status and protections that will or will not be afforded to such entities which, at the very least, have significant ties to foreign sovereign nations; it is an issue with obvious, demonstrated potential to recur; and it is an issue on which decisions of the lower courts are in disarray. If, as urged by Respondents, the court below correctly interpreted the statute, it is all the more reason to grant review and so declare, so the law can be correctly applied in the innumerable cases yet to come where the issue will be presented.

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8. Respondents make passing reference to a third argument, consistently raised by plaintiffs in these DBCP banana workers' cases, and consistently rejected by the courts, that Dead Sea has already settled the claim asserted against it by the defendants. *See* Brief in Opposition at 5. The assertion is without merit. *See, e.g., Delgado*, 231 F.3d at 182.

CONCLUSION

For all of the foregoing reasons, and the reasons set forth in the Dead Sea Companies' Petition, the Petition should be granted.

Respectfully submitted,

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Nos. 01-593 and 01-594

In the Supreme Court of the United States

DOLE FOOD COMPANY, ET AL., PETITIONERS

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GERARDO DENNIS PATRICKSON, ET AL.

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v.

GERARDO DENNIS PATRICKSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1603(b)(2), defines an "agency or instrumentality of a foreign state" as an entity that (among other definitional requirements) is a separate legal person, such as a corporation, "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." This case presents the following questions:

1. Whether a corporation is an "agency or instrumentality" if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation.

2. Whether a corporation is an "agency or instrumentality" if a foreign state owned a majority of the shares of the corporation at the time of the events giving rise to litigation, but the foreign state does not own a majority of those shares at the time that a plaintiff commences a suit against the corporation.

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In the Supreme Court of the United States

No. 01-593

DOLE FOOD COMPANY, ET AL., PETITIONERS

v.

GERARDO DENNIS PATRICKSON, ET AL.

No. 01-594

DEAD SEA BROMINE CO., LTD., ET AL., PETITIONERS

v.

GERARDO DENNIS PATRICKSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Respondents are foreign farm workers who brought suit in Hawaii state court against various fruit and chemical companies to recover damages for injuries allegedly resulting from the overseas use of the pesticide dibromochloropropane (DBCP). The defendant companies are the petitioners in No. 01-593 (*Dole*). The *Dole* petitioners impleaded two companies incorporated

in Israel, Dead Sea Bromine Company (DSB), and Bromine Compounds Limited (BCL) (collectively the Dead Sea Companies), that allegedly produced DBCP that was used on foreign fruit farms. The Dead Sea Companies are the petitioners in No. 01-594 (*Dead Sea*). The Dead Sea Companies removed the suit to federal court under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.* The court of appeals reversed the federal district court's order granting removal, holding that the Dead Sea Companies are not agencies or instrumentalities of a foreign state for purposes of the FSIA. Pet. App. 1a-23a.[1]

1. The FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in our courts," whether state or federal. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Section 1603(a) of the FSIA provides that, except for purposes of Section 1608 (which addresses service of process on a foreign state), a "foreign state" includes a "political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. 1603(a). Subsection (b) of Section 1603 provides:

> An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

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[1] Citations to "Pet. App." refer to the *Dole* petition appendix.

> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. 1603(b). By virtue of provisions of the general federal removal statute, 28 U.S.C. 1441(d), the FSIA also "guarantees foreign states the right to remove any civil action from a state court to a federal court." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (citing 28 U.S.C. 1441(d)).

2. This case is one of numerous personal injury suits in which foreign farm workers, such as respondents, seek compensation from various fruit and chemical companies for injuries allegedly suffered as a result of overseas use of DBCP on foreign fruit farms. As the court of appeals noted, "[t]his case represents one front in a broad litigation war between these plaintiffs' lawyers and these defendants." Pet. App. 4a. Some of the tactical maneuvering in that litigation war has centered on whether the Dead Sea Companies, which allegedly produced and sold DBCP for use on foreign fruit farms, should be joined in this litigation, and on whether those Israeli corporations are entitled to invoke removal jurisdiction pursuant to the FSIA.

During the period of time in which the use of DBCP occurred, the State of Israel did not itself own a majority of the shares of the Dead Sea Companies, but it owned shares of other corporations that in turn owned shares of the Dead Sea Companies. Pet. App. 16a, 33a. From 1968 to 1975, Israel owned the majority of shares of Dead Sea Works, Ltd., which owned a majority of the shares of DSB. 01-594 Pet. 6. From 1975 to 1995, Israel owned a majority of the shares of Israel Chemicals, Ltd., which owned a majority of the

shares of Dead Sea Works, Ltd., which owned a majority of the shares of DSB. *Id.* at 7. During relevant portions of those periods, DSB owned a majority of the shares of BCL. *Ibid.*; see also Br. in Opp. 17-18 n.3. By 1995, two years before this suit was brought, Israel had sold its majority interest in Israel Chemicals, Ltd. See Pet. App. 16a-17a, 33a; 01-594 Pet. ii, 5-7; Br. in Opp. 17-18 n.3.

3. In this case, as in other similar suits, the foreign farm workers did not name the Dead Sea Companies as defendants in their tort suit; rather, they sought to craft their claims to avoid implicating those companies. See Br. in Opp. 13-14; see also, *e.g.*, *Delgado* v. *Shell Oil Co.*, 231 F.3d 165, 177-180 (5th Cir. 2000), cert. denied, 532 U.S. 972 (2001). The *Dole* petitioners, however, impleaded the Dead Sea Companies as third-party defendants, and the Dead Sea Companies, in turn, invoked the FSIA and removed the case to federal district court. Pet. App. 27a. The district court concluded that the indirect nature of Israel's interest in the Dead Sea Companies failed to satisfy Section 1603(b)(2)'s definition of an "agency or instrumentality." *Id.* at 33a-39a. The district court nevertheless upheld removal on the alternative theory, advanced by the *Dole* petitioners, that the federal common law of foreign relations provided jurisdiction sufficient to support removal. *Id.* at 46a-49a.

4. The court of appeals held that the case had not been properly removed to federal court and ordered it remanded to state court. Pet. App. 1a-23a. The court of appeals first rejected the district court's rationale that removal could be justified because the case might implicate federal common law respecting foreign relations, finding that Congress had not authorized removal on that basis. See *id.* at 5a-16a. The court then

rejected the theory, which had been rejected by the district court, that Israel's interest in the Dead Sea Companies was sufficient to satisfy the FSIA's "agency or instrumentality" test. *Id.* at 16a-23a.

The court of appeals questioned, at the outset, whether the FSIA provisions were relevant because, by the time of suit, Israel had divested its majority stock ownership in the parent corporations that owned the stock of the Dead Sea Companies. Pet. App. 16a-19a. The court nevertheless "assume[d] for purposes of this case that the FSIA would grant federal jurisdiction over an entity that at the time of the tortious conduct was—but no longer is—a government instrumentality." *Id.* at 19a.

The court then determined that its prior decision in *Gates* v. *Victor Fine Foods*, 54 F.3d 1457 (9th Cir.), cert. denied, 516 U.S. 869 (1995), resolved the question whether, for purposes of the FSIA, Israel owned a majority of the shares of the Dead Sea Companies. *Gates* "held that a corporation wholly owned by an instrumentality of a foreign government is not a foreign instrumentality under the FSIA." Pet. App. 19a. The court ruled that, because the State of Israel did not itself own the majority of the shares of stock in the Dead Sea Companies, those companies were not agencies or instrumentalities of a foreign state for purposes of the FSIA. *Id.* at 19a-21a.

Finally, the court of appeals rejected, on the facts, the argument that the Dead Sea Companies were agents or instrumentalities of the State of Israel because they were "organs" of the State of Israel within the meaning of 28 U.S.C. 1603(b)(2). Pet. App. 21a-22a. Rather, the court reasoned that Dead Sea Companies were "indirectly owned commercial operations, which do not qualify as instrumentalities under the FSIA."

Id. at 23a. The court of appeals accordingly directed the district court to remand the case to Hawaii state court. *Ibid.*

DISCUSSION

This Court should grant the petitions for a writ of certiorari. The court of appeals correctly concluded that the FSIA does not extend foreign instrumentality status to the subsidiaries of a corporation, "a majority of whose shares * * * is owned by a foreign state." 28 U.S.C. 1603(b)(2). The courts of appeals, however, are squarely divided on that issue, and that circuit conflict warrants resolution by this Court. In one respect, this case may not be an ideal vehicle for doing so, because it raises the separate question whether the FSIA grants foreign instrumentality status to a corporation if the foreign state no longer owns a majority of the shares at the time of suit. The answer to that question, which was raised but not decided below, would provide an alternative basis for affirmance. Notwithstanding the presence of that additional issue, this case on balance presents an appropriate vehicle for resolving the question presented by the petitions. If the Court grants the petitions, however, it should request the parties to address that additional issue in their briefs on the merits.

1. As relevant here, Section 1603(b)(2) defines an instrumentality of a foreign state as an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. 1603(b)(2). That statutory language—requiring that "shares * * * [be] owned by a foreign state"—is most naturally understood to refer to actual legal ownership of a corporation's stock, and not to

constructive ownership through a tiered corporate structure.

Section 1603(b)(2) should be construed in light of basic legal understandings respecting the consequences of utilizing the corporate form. As this Court has recognized, "incorporation's basic purpose is to create a distinct legal entity." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001). Accordingly, "[a] corporation and its stockholders are generally to be treated as separate entities." *Burnet* v. *Clark*, 287 U.S. 410, 415 (1932). For that reason, "the parent corporation and its subsidiary are treated as separate and distinct legal persons even though the parent owns all the shares in the subsidiary and the two enterprises have identical directors and officers." Harry Henn & John Alexander, *Laws of Corporations* § 148, at 355 (1983).

Under that background rule, a foreign state's ownership of a majority of the shares of stock of a parent corporation that owns a majority of the shares of a subsidiary may give the foreign state effective control of the subsidiary, but it does not mean that the foreign state itself owns a majority of the shares of the subsidiary. Rather, it is the parent corporation that owns the shares of stock in the subsidiary as a corporate asset. See 1 *Fletcher Cyclopedia of the Law of Private Corporations* § 31, at 509 (rev. perm. ed. 1999) ("[t]he property of the corporation is its property, and not that of the shareholders, as owners" (footnote omitted)). Accord Henn & Alexander, *supra*, § 71, at 128-129 ("Shareholders are neither agents of the corporation or of each other nor owners of the corporation's assets."). That principle of separate corporate status is reflected in the related concept of limited corporate liability. See, *e.g.*, *United States* v. *Bestfoods*,

524 U.S. 51, 62 (1998) (a parent corporation is not "liable as an owner or operator under [the Comprehensive Environmental Response, Compensation, and Liability Act of 1980] simply because its subsidiary is subject to liability for owning or operating a polluting facility").[2]

Congress is presumed to enact legislation against the backdrop of those "bedrock" principles of corporate law. See *Bestfoods*, 524 U.S. at 62. There is no reason to depart from those principles in construing the FSIA, at least where, as appears to be the case here, the corporations at issue are organized under principles of foreign law that parallel the background principles of corporate law in the United States. To the contrary, this Court has recognized, in the context of assessing whether a foreign-owned company may be held liable for the acts of its government, that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." See *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983).[3]

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[2] In this case, of course, the State of Israel is even further removed from owning shares of the Dead Sea Companies because of the presence of two intermediate corporations, Israel Chemicals, Ltd., and Dead Sea Works, Ltd. See pp. 3-4, *supra*.

[3] As the Court recognized in *First National City Bank*, the separate entity limitation "may be overcome in certain circumstances." 462 U.S. at 628. See, *e.g.*, *id.* at 628-633. Likewise, the general rule that a parent corporation does not own the assets of its subsidiary is subject to limited exceptions, but those exceptions should not be lightly inferred. See, *e.g.*, *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988) (holding that Congress's restriction on the importation of trademarked products whose trademark is "owned by" a United States company does not unambiguously apply to a product whose trademark is owned by a United States subsidiary of a foreign corporation); 1 Fletcher, *supra*, § 31, at 518

Section 1603(b)(2) should be interpreted in light of the foregoing principles. That Section provides that the term "agency or instrumentality" of a foreign state includes a corporation "a majority of *whose* shares * * * is *owned by a foreign state*." 28 U.S.C. 1603(b)(2) (emphasis added). In this case, the State of Israel may have exercised effective control over the Dead Sea Companies through its ownership of the shares of their parent corporations, but, under the plain terms of the FSIA, that does not suffice. Israel itself has never *owned* a majority of the shares of DSB and BCL, the companies *whose* shares are relevant. Accordingly, those companies are not agencies or instrumentalities of the State of Israel.[4]

("Under certain circumstances, to work justice, the corporate entity and ownership may be disregarded and the shareholder or shareholders regarded as owners; but this concedes the general rules to be just as stated."); cf. *Flink* v. *Paladini*, 279 U.S. 59, 63 (1929) (Holmes, J.) ("In common speech the stockholders [of a corporation that owned a ship] would be called owners [of the ship], recognizing that their pecuniary interest did not differ substantially from those who held shares in the ship.").

[4] When Congress intends legislation to embrace both a parent corporation and its subsidiaries, it typically uses more explicit language. For example, the Newspaper Preservation Act defines "newspaper owner" to mean "any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications." 15 U.S.C. 1802(3). Similar formulations, referring to direct or indirect ownership or control, appear in many other provisions throughout the United States Code. See *e.g.*, 7 U.S.C. 1a(8) (agricultural cooperative associations); 12 U.S.C. 221a(b)(4) (bank affiliates); 12 U.S.C. 1813(w)(4)(A) (bank subsidiaries); 12 U.S.C. 3106(c)(1) (foreign bank affiliates); 22 U.S.C. 5605(b)(2)(F) (foreign air carriers); 26 U.S.C. 482 (allocation of income and deductions among taxpayers); 30 U.S.C. 184(a)(1) (coal lease acreage limitations); 47 U.S.C. 702(7) (communications common carriers). There can be no doubt that

The Fifth Circuit's decision in *Delgado* v. *Shell Oil Co.*, 231 F.3d 165 (2000), cert. denied, 532 U.S. 972 (2001), does not provide an adequate rationale for a contrary result. That court reasoned that "[t]he plain language of the statute * * * draws no distinction between direct and indirect ownership; neither does it expressly impose a requirement of direct ownership." *Delgado*, 231 F.3d at 176. But that line of reasoning assumes that Congress wrote Section 1603(b)(2) without regard to established corporate law principles and that Congress has an obligation to distinguish between "direct" and "indirect" ownership. This Court has indicated, however, that exactly the opposite presumption should apply. See, *e.g.*, *Bestfoods*, 524 U.S. at 62; *First Nat'l City Bank*, 462 U.S. at 623.

The Seventh Circuit's analysis in *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932 (1996), is also unsatisfactory. That court concluded that, by defining a foreign state to include an agency or instrumentality, Congress intended to allow a parent corporation that qualifies as an agency or instrumentality to imbue any of its majority-owned subsidiaries with a similar status. See *Roselawn*, 96 F.3d at 939. The Seventh Circuit's recursive approach "would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line." See *Gates*, 54 F.3d at 1462. That result, however, is inconsistent with Section 1603(b)(2)'s text, which confers agency or instrumentality status on an entity "a majority of whose shares

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such language is intended to embrace affiliated corporations. But the pertinent language of Section 1603(b)(2) offers no such indication; indeed, it does not include the concept of control (as opposed to ownership), any variation of the phrase "direct or indirect," or any reference to subsidiary corporations.

* * * is owned by a *foreign state* or *political subdivision*." 28 U.S.C. 1603(b)(2) (emphasis added). If Congress had intended that ownership by another agency or instrumentality would also suffice, it would have conferred "agency or instrumentality" status on any entity "a majority of whose shares * * * is owned by a foreign state or political subdivision *or agency or instrumentality of a foreign state*." Congress's failure to include the italicized words, while including both "foreign state" and "political subdivision," indicates that Congress did not intend the Seventh Circuit's result. See *Gates*, 54 F.3d at 1462.

The result that the Fifth and Seventh Circuits have reached suffers from an additional defect. Interpreting Section 1603(b)(2) to extend "agency or instrumentality" status to second-tier or further-removed subsidiaries would grant foreign states more generous immunity-based protections than foreign states extend to the United States or other foreign states. Foreign states generally do not grant such protections to government-owned corporations *at all* unless those corporations are engaged in sovereign acts. See William Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tulane L. Rev. 535 (1991). The FSIA's grant of foreign sovereign status to first-tier corporations reflects a conscious decision to extend the benefits of the FSIA—presumptive immunity from suit and various procedural protections —beyond what foreign states typically provide on a reciprocal basis. But Congress did not manifest an intention to take the additional step of extending those special benefits of this Nation's foreign sovereign immunity regime still further. The courts should be cautious in extending

those benefits through a judicial interpretation of the FSIA that departs from familiar corporate law principles. The court of appeals correctly declined to extend the FSIA in that manner, and it therefore properly ruled that the FSIA does not provide a basis for removal of this action to federal court. Pet. App. 19a-21a.[5]

2. The Ninth Circuit correctly resolved whether the FSIA's definition of an agency or instrumentality extends not only to a corporation, a majority of whose shares are owned by a foreign state, but also to subsidiaries of such a majority-owned corporation. Nevertheless, the Court should grant the petitions for a writ of certiorari to resolve the conflict on that issue between the Ninth Circuit, on the one hand, and the Fifth and Seventh Circuits on the other.

As the Ninth Circuit acknowledged in this case, the courts of appeals expressly disagree on whether the FSIA's definition of "agency or instrumentality" in Section 1603(b)(2) extends to an entity whose shares are owned by a parent corporation, a majority of whose shares are, in turn, owned by a foreign state. See Pet. App. 20a-21a. The Ninth Circuit has twice held that

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[5] A different approach to ownership of shares or "other ownership interests" (28 U.S.C. 1603(b)(2)) might be appropriate if the entity in question were organized under a legal system whose principles governing enterprise organization do not resemble our own. See Pet. App. 20a. Furthermore, a determination that a foreign state does not own a majority of the shares of a corporate entity does not exclude the possibility that the corporation may nevertheless qualify as an "organ" of a foreign state. 28 U.S.C. 1603(b)(2); see Pet. App. 21a-23a. That alternative means of qualifying as an agency or instrumentality of a foreign state provides considerable protection to corporate entities that, while not majority-owned by a foreign state, nevertheless exercise sovereign powers or perform sovereign functions on behalf of a foreign state.

those entities are not instrumentalities of the foreign state. See *ibid.*; *Gates* v. *Victor Fine Foods*, 54 F.3d 1457, 1462, cert. denied, 516 U.S. 869 (1995). The Fifth and Seventh Circuits, by contrast, have extended the protections of the FSIA to companies that are owned by another company that is, in turn, owned by a foreign state or its political subdivision. See *Delgado* v. *Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000), cert. denied, 532 U.S. 972 (2001); *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932, 939-941 (7th Cir. 1996).[6]

That conflict among the circuits is unlikely to be resolved by further consideration in the lower courts. The court of appeals in this case did not question the correctness of *Gates*. See Pet. App. 21a, 123a. Furthermore, the Ninth Circuit had already decided *Gates* at the time the Fifth Circuit decided *Delgado* and the Seventh Circuit decided *Roselawn*, and the Fifth Circuit and the Seventh Circuit each declined to follow *Gates*. See *Delgado*, 231 F.3d at 176; *Roselawn*, 96 F.3d at 939-941. All of those courts have denied petitions for rehearing or rehearing en banc on the issue. See Pet. App. 123a; *Delgado*, 231 F.3d at 166; *Roselawn*, 96 F.3d at 932 (1996 WL 531704, at *1). Hence, the conflict among the courts of appeals is likely to persist.

In enacting the FSIA, Congress recognized "the importance of developing a uniform body of law in this area." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 32 (1976). See *Verlinden*, 461 U.S. at 489. That need for

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[6] The Sixth and District of Columbia Circuits also have applied the FSIA to tiered corporations, albeit without meaningful discussion of the issue. See *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988); *Gilson* v. *Republic of Ireland*, 682 F.2d 1022, 1026 (D.C. Cir. 1982).

uniformity counsels in favor of granting review in this case to resolve the persistent conflict.

3. In addition to presenting the question of how the FSIA's definition of "agency or instrumentality" applies to tiered corporations, this case appears to pose the question whether the FSIA applies to "companies that were owned by the [foreign] state at the time of the allegedly tortious conduct, but have since been cut free." Pet. App. 17a. The court of appeals did not reach that question, and petitioners have not included it in their requests for review, but respondents have identified that issue as a reason to deny the petitions for a writ of certiorari. Respondents suggest that Israel's divestiture of a majority interest in the parent corporations that owned a majority of the shares of the Dead Sea Companies would provide an alternative basis for affirming the judgment below. Br. in Opp. 11-13.[7]

The so-called "timing" question has not generated a conflict among the courts of appeals. As the court of appeals noted, "all courts that have considered the issue have held that the FSIA applies to an entity that was a foreign state at the time of the [alleged] wrongdoing, even if the entity is no longer a state instrumentality [at the time of suit]." Pet. App. 17a, citing *Pere* v. *Nuovo Pignone, Inc.*, 150 F.3d 477, 480-481 (5th Cir.

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[7] The court of appeals presumably elected to decide the case based on whether Israel owned a majority of the shares of the Dead Sea Companies because its prior decision in *Gates* dictated the result on that issue. But in the absence of that circumstance, there is no obvious reason why the "tiering" issue should be decided before the "timing" issue. Each turns on construction of Section 1603(b)(2), which places a potential limitation on the federal court's jurisdiction and the availability of removal under 28 U.S.C. 1441(d).

1998), cert. denied, 525 U.S. 1141 (1999); *General Elec. Capital Corp.* v. *Grossman*, 991 F.2d 1376, 1381-1382 (8th Cir. 1993); and *Gould, Inc.* v. *Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988). Cf. *Straub* v. *A P Green, Inc.*, 38 F.3d 448, 451 (9th Cir. 1994) (holding that the FSIA applies when a party is a state instrumentality at the time the lawsuit is filed, even though it was not an instrumentality at the time of the alleged wrongdoing).

Nevertheless, the court of appeals correctly recognized that "the unanimity of other circuits" may not reflect a correct interpretation of the FSIA. Pet. App. 17a. Section 1603(b)(2) is more naturally read to require that the statutory definition of an agency or instrumentality must be satisfied at the time of suit. Most tellingly, the text of Section 1603(b)(2) uses the present tense. An entity comes within the definition of an agency or instrumentality if a majority of its shares "*is* owned by a foreign state." 28 U.S.C. 1603(b)(2). That use of the present tense indicates that present ownership is required at the time of suit, when the subject matter jurisdiction of the court is normally ascertained. See, *e.g.*, *Anderson* v. *Watts*, 138 U.S. 694, 702-703 (1891). Contrary to the view of the Eighth Circuit, Section 1603(b)(2) cannot reasonably be read to "speak to a variety of situations, including the time of the alleged wrongdoing." *GE Capital*, 991 F.2d at 1381 (citing *Wiener* v. *Eastern Ark. Planting Co.*, 975 F.2d 1350, 1355 (8th Cir. 1992)).

Congress sought to preclude United States courts from exercising jurisdiction over *foreign states*, including their agencies or instrumentalities, except when a particular statutory exception to immunity would apply. See, *e.g.*, *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 610 (1992). The courts of

appeals that have decided the issue have identified no adequate basis in the text, structure, or purpose of the FSIA that would justify treating a corporation as an agency or instrumentality of a foreign state when it lacks the necessary affiliation with the foreign state at the time of suit. The mere fact that a corporation once was, but no longer is, owned by a foreign state does not provide a basis for conferring the extraordinary benefit of the special procedural protections of the FSIA and the presumptive immunity from suit it affords under 28 U.S.C. 1604.

Although the question whether the foreign state must own a majority of shares of the corporation at the time of suit in order for the corporation to qualify as an agency or instrumentality has not generated a conflict among the courts of appeals, it presents an important issue under the FSIA in its own right, and the Ninth Circuit in this case expressed serious reservations about the conclusion reached by other court of appeals that have decided it. See Pet. App. 16a-19a. The "timing" issue also serves to illuminate further the relatively attenuated claim by petitioners to the special protections of the FSIA for the corporations in this case. For those reasons—and in light of the strong federal interest in a uniform interpretation of the FSIA and the apparent misconception of all the courts of appeals that have decided the timing issue—if the Court grants the petitions for writ of certiorari, the Court should request the parties to address the timing issue as well.[8]

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[8] This Court noted, but did not decide, a timing issue that presents the reverse of the situation here. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989). There, petitioner had been a private company during the relevant period and was nationalized

CONCLUSION

The petitions for a writ of certiorari should be granted. In addition, the Court should request the parties to address the question whether a corporation is an "agency or instrumentality" of a foreign state if the foreign state owned a majority of the shares of the corporation at the time of the events giving rise to the litigation, but no longer owns a majority of those shares at the time that the plaintiff commences a suit against the corporation.

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and arguably became an instrumentality of a foreign state during the pendency of the case in the bankruptcy court. Respondent sought to use that status offensively, seeking a ruling that petitioner was not entitled to request a jury trial because such tribunals are not available under the FSIA. This Court declined to address that question because respondent had not raised it below and it had not been "adequately briefed and argued." *Ibid.* Here, the question was raised in the courts below, and, if the Court so directed, there would be a full opportunity for the parties, including the United States as amicus curiae, to brief the issue.

Supreme Court, U.S.
FILED
AUG 23 2002
OFFICE OF THE CLERK

Nos. 01-593, 01-594

IN THE

Supreme Court of the United States

DOLE FOOD COMPANY, *et al.*,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

DEAD SEA BROMINE CO. LTD, *et al.*,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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I. THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, CV-97-1516

1.	10/31/97	Notice of Removal from First Circuit Case Number: CV 97-4062-09
2.	11/03/97	Supplemental Notice of Removal
3.	11/12/97	First Amended Answer by Defendant Pineapple Growers Ass'n
4.	11/12/97	Answer by Defendant Occidental Chem Corp.
5.	11/12/97	Answer by Defendant Shell Oil Co.
6.	11/12/97	Answer by Defendant Dow Chemical Co.
7.	11/12/97	Answer by Defendant Chiquita Brands Inc., Defendant Chiquita Brands Int'l, Defendant Maritrop Trading Corp.
8.	11/20/97	Answer to Third Party Complaint by Third-Party Defendants Dead Sea Bromine Co., and Bromine
9.	11/20/97	Answer by Defendant Amvac Chemical Corp.
10.	12/02/97	Notice of Motion and Motion by Plaintiff Gerardo Dennis Patrickson et. al for Remand and in Opposition to the Supplemental Grounds for Removal
11.	12/02/97	Memorandum of Points and Authorities in Support of Motion for Removal
12.	12/03/97	Notice of Motion and Motion by Plaintiff Gerardo Dennis Patrickson, et. al for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction.
13.	12/03/97	Memorandum of Points and Authorities in Support of Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction.
14.	12/05/97	Supplemental Declaration of Counsel by Plaintiffs in Support of Plaintiffs' Motion for

		Remand and in Opposition to the Supplemental Grounds for Removal
15.	12/05/97	Supplemental Declaration of Counsel by Plaintiffs in Support of Plaintiffs' Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction
16.	12/17/97	Notice of Motion and Motion by Defendant Del Monte Fresh Produce to Dismiss for Failure to State a Claim and for Lack of Personal Jurisdiction
17.	12/17/97	Memorandum of Points and Authorities in Support of Motion to Dismiss
18.	12/24/97	Notice of Motion and Motion by Defendant Dow Chemical Co. to Dismiss and for Injunctive Relief
19.	12/24/97	Memorandum of Points and Authorities in Support of Motion to Dismiss and for Injunctive Relief
20.	03/03/98	Amended Complaint Terminating Plaintiff Melgar Olimpio Moreno; Adding Del Monte Fresh Hawaii, Del Monte Fresh Produce Co. and Fresh Del Monte N.V.
21.	03/06/98	Motion by Defendant Standard Fruit Co. to Dismiss for Lack of Personal of Personal Jurisdiction, Improper Venue and Insufficiency of Service of Process
22.	03/06/98	Memorandum in Support of Motion to Dismiss
23.	03/06/98	Motion by Defendant Standard Fruit and Steamship to Dismiss or for Lack of Personal Jurisdiction, Improper Venue and Insufficiency of Service of Process
24.	03/06/98	Memorandum in Support of Motion to Dismiss
25.	03/06/98	Motion by Defendant Standard Fruit Co. Costa Rica to Dismiss for Lack of Personal

		Jurisdiction, Improper Venue and Insufficiency of Service of Process
26.	03/06/98	Memorandum in Support of Motion to Dismiss
27.	03/06/98	Motion by Defendant Standard Fruit Co de Honduras to Dismiss for Lack of Personal Jurisdiction, Improper Venue and Insufficiency of Service of Service of Process
28.	03/06/98	Memorandum in Support of Motion to Dismiss
29.	03/06/98	Motion by Defendant Dole Fresh Fruit Int'l Ltd. to Dismiss for Lack of Personal Jurisdiction, Improper Venue and Insufficiency of Service of Process
30.	03/06/98	Memorandum in Support of Motion to Dismiss
31.	03/06/98	Motion by Defendant Dole Fresh Fruit Int'l Inc. to Dismiss for Lack of Personal Jurisdiction, Improper Venue and Insufficiency of Service of Process
32.	03/06/98	Memorandum in Support of Motion to Dismiss
33.	03/18/98	Response by Plaintiffs to Defendants' Motion to Dismiss on Forum Non Conveniens and Comity Grounds; to Motion to Dismiss for Failure to State a Claim and for Lack of Personal Jurisdiction
34.	03/19/98	Memorandum of Law by Third-Party Defendants Dead Sea Bromine Co. and Bromine Compounds in Opposition to Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction
35.	03/19/98	Appendix Filed by Third-Party Defendants' Dead Sea Bromine Co. and Bromine Compounds re Memorandum of Law in Opposition to Motion to Remand

36.	03/19/98	Answer by Defendant Pineapple Growers as to Amended Complaint
37.	03/19/98	Answer by Defendant Standard Fruit Co. to Amended Complaint
38.	03/19/98	Answer by Defendant Standard Fruit Co. de Honduras to Amended Complaint
39.	03/19/98	Answer by Defendant Standard Fruit & Steamship Co. to Amended Complaint
40.	03/19/98	Answer by Defendant Dole Food Co. to Amended Complaint
41.	03/19/98	Answer by Defendant Dole Fresh Fruit Co. to Amended Complaint
42.	03/19/98	Answer by Defendant Dole Fresh Fruit Inc. to Amended Complaint
43.	03/19/98	Answer by Defendant Dole Fresh Fruit Int'l. Ltd. to Amended Complaint
44.	03/19/98	Answer by Defendant Standard Fruit Co. Costa Rica to Amended Complaint
45.	03/19/98	Joint Memorandum by Defendants Dole Food Co., Pineapple Growers, Amvac Chem. Corp., Shell Oil Co., Dow Chem. Co., Occidental Chem. Corp., Chiquita Brands Inc., Chiquita Brands Int'l, Del Monte Fresh Prod., Del Monte Fresh Produce in Opposition to Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction and to Motion for Remand and in Opposition to the Supplemental Grounds for Removal
46.	03/24/98	Amended Answer by Defendant Dow Chemical Co.
47.	03/25/98	Reply by Plaintiffs to Third-Party Defendants Dead Sea Bromine Co. Ltd. and Bromine Compounds Limited's Response to Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction and

		Motion for Remand and in Opposition to the Supplemental Grounds for Removal
48.	03/26/98	Answer by Defendant Occidental Chem. Corp. to Amended Complaint
49.	03/26/98	Reply by Plaintiffs to Defendants' Joint Response to Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction and Motion for Remand and in Opposition to the Supplemental Grounds for Removal
50.	03/26/98	Reply by Defendants Shell Oil Co., Dole Food Co., Dole Fresh Fruit Co., Dole Fresh Fruit Int'l, Dole Fresh Fruit Inc., Standard Fruit Co., Standard Fruit & Steamship, Standard Fruit Co. Costa Rica, Standard Fruit Co. Honduras, Pineapple Growers Ass'n, Dow Chem. Co., Del Monte Fresh Produce, Del Monte Fresh Produce Co., Chiquita Brands Inc., Chiquita Brands Int'l, Occidental Chem. Corp. to Response to Motion to Dismiss for Lack of Personal Jurisdiction, Improper Venue and Insufficiency of Service of Process
51.	03/27/98	Answer by Defendant Shell Oil Co. to Amended Complaint
52.	04/02/98	Answer by Defendants Chiquita Brands Inc., Chiquita Brands Int'l, Maritrop Trading Corp. to Amended Complaint
53.	04/10/98	Answer by Defendant Amvac Chem. Corp. to Amended Complaint
54.	05/14/98	Memorandum by Plaintiffs in Opposition to Dole Fresh Fruit Int'l, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction, Improper Venue and Insufficiency of Service of Process

55.	05/14/98	Memorandum by Plaintiffs in Opposition to Standard Fruit Co.'s Motion to Dismiss for Lack of Personal Jurisdiction, Improper Venue and Insufficiency of Service of Process
56.	05/14/98	Memorandum by Plaintiff in Opposition to Standard Fruit & Steamship Co.'s Motion to Dismiss or for Lack of Personal Jurisdiction, Improper Venue and Insufficiency of Service of Process
57.	05/14/98	Memorandum by Plaintiff in Opposition to Standard Fruit Co. de Costa Rica S.A's Motion to Dismiss for Lack of Personal Jurisdiction, Improper Venue and Insufficiency of Service of Process
58.	05/14/98	Memorandum by Plaintiff in Opposition to Standard Fruit Co. de Honduras, S.A.'s Motion to Dismiss for Lack of Personal Jurisdiction, Improper Venue and Insufficiency of Service of Process
59.	05/14/98	Memorandum by Plaintiff in Opposition to Dole Fresh Fruit Int'l, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction, Improper Venue and Insufficiency of Service of Process
60.	08/18/98	Answer by Defendant Shell Oil Co. to Amended Complaint
61.	09/09/98	Order Denying Plaintiffs' Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction and Denying Plaintiffs' Motion for Remand and in Opposition to the Supplemental Grounds for Removal and Granting Certain Defendants' Motion to Dismiss and for Injunctive Relief Filed 12/24/97 and Denying Plaintiffs' Motion to Strike Defendants' Supplemental Affidavits

62. 09/09/98 Order Conditionally Granting Defendants' Motion to Dismiss on Forum Non Conveniens Grounds
63. 09/18/98 Motion by Plaintiffs to Alter or Amend Judgment under Rule 59(e)
64. 09/18/98 Memorandum in Support of Motion to Alter or Amend Judgment
65. 09/23/98 Notice of Motion and Motion by Defendants Chiquita Brands Inc., Chiquita Brands Int'l, Maritrop Trading Corp. for Clarification, or, in the Alternative, for Reconsideration of the Court's 9/9/98 Order Denying Plaintiffs' Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction and Denying Plaintiffs' Motion for Remand and in Opposition to the Supplemental Grounds for Removal and Granting Certain Defendants' Motion to Dismiss and for Injunctive Relief Filed 12/24/97 and Denying Plaintiffs' Motion to Strike Defendants' Supplemental Affidavits
66. 09/23/98 Memorandum in Support in Motion for Clarification
67. 09/24/98 Second Motion and Memorandum by Plaintiffs to Alter or Amend Judgment under Rule 59(e)
68. 10/01/98 Memorandum by Defendants Dole Food Co., Dole Fresh Fruit Int'l, Dole Fresh Fruit Inc., Standard Fruit Co., Standard Fruit & Steamship, Standard Fruit Co. de Costa Rica, Standard Fruit Co. de Honduras, Dow Chem. Co. in Opposition to Motion to Alter or Amend Judgment under Rule 59(e)
69. 10/02/98 Memorandum by Plaintiffs in Opposition to Motion for Clarification, or, in the Alternative, for Reconsideration of the

		Court's 9/9/98 Order Denying Plaintiffs' Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction and Denying Plaintiffs' Motion for Remand and in Opposition to the Supplemental Grounds for Removal and Granting Certain Defendants' Motion to Dismiss and for Injunctive Relief Filed 12/24/97 and Denying Plaintiffs' Motion to Strike Defendants' Supplemental Affidavits
70.	10/02/98	Memorandum by Plaintiffs in Opposition to Motion for Reconsideration of the Court's FSIA Ruling
71.	10/13/98	Reply by Plaintiffs to Response to Motion to Alter or Amend Judgment under Rule 59(e)
72.	10/14/98	Reply Memorandum of Law by Third-Party Defendants Dead Sea Bromine Co., and Bromine Compounds to Response to Motion for Reconsideration of the Court's FSIA Ruling
73.	10/15/98	Reply Memorandum by Defendants Chiquita Brands Inc., Chiquita Brands Int'l, Maritrop Trading Corp. to Response to Motion for Clarification, Or, in the Alternative, for Reconsideration of the Court's 9/9/98 Order
74.	10/19/98	Order Denying Plaintiff's Motion to Alter or Amend Judgment under Rule 59(e)
75.	10/19/98	Order Granting Plaintiffs' Motion to Alter or Amend Judgment under Rule 59(e) and Granting Defendants Chiquita Brands, Inc., Chiquita Brands Int'l, Inc. and Maritrop Trading Corp.'s Motion for Clarification; Clarifies the Issue Raised by Defendants Chiquita Brands, Inc., et. al Re: Personal Jurisdiction; and Amends the 9/9/98 Order to Read, Beginning on Page 62: "This Action

		Will Be Dismissed 90 Days after the Filing Date" Is Stricken; and Inserted Is "This Action Will Be Dismissed 180 Days after the Filing Date of this Order Provided. . ."
76.	11/17/98	Order Denying Third Party Defendants Dead Sea Bromine Co., Ltd. and Bromine Compound Limited's Motion for Reconsideration of the Court's FSIA Ruling
77.	03/08/99	Order Dismissing Action and Accepting in Part and Rejecting in Part Various Defendants' Agreements Regarding Conditions of Dismissal for Forum Non Conveniens
78.	03/11/99	Judgment: Entered Pursuant to the "Order Dismissing Action and Accepting in Part and Rejecting in Part Del Monte Defendants' Agreements Regarding Conditions of Dismissal for Forum Non Conveniens, et. al."
79.	03/19/99	Notice of Dole Defendants' Motion to Alter or Amend Judgment under Rule 59(3) and 59(e)
80.	03/19/99	Memorandum in Support of Motion to Alter or Amend
81.	03/22/99	Notice of Motion and Motion to Reconsider under Rule 59(e)
82.	04/14/99	Reply to Plaintiffs' Response to Dole Defendants' Motion to Alter or Amend Judgment under Rule 59(e)
83.	04/15/99	Reply by Del Monte Defendants to Plaintiffs' Response to Motion of the Del Monte Defendants in Support of Their Motion to Alter or Amend Judgment under Rule 59(e)
84.	04/26/99	Memorandum by Defendant Dow Chem. Co. in Opposition to Plaintiffs' Motion to Reconsider Rule 59(e) and Supplemental Motion to Reconsider under Rule 59(e)

85. 06/16/99 Order Denying Dole Defendants' and Del Monte Defendants' Motions to Alter or Amend Judgment under Rule 59(e)
86. 06/30/99 Notice of Appeal by Plaintiff
87. 07/14/99 Notice of Cross-Appeal by Third-Party Defendants Dead Sea Bromine Co. and Bromine Compounds

II. UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 99-16524

1. 10/18/99 Patrickson et. al First Brief on Cross-Appeal
2. 12/30/99 Brief of Appellee Dole Food Co., Standard Fruit, et. al
3. 01/03/00 Second Brief of Third-Party Defendants/appellants/Cross Appellants Dead Sea Bromine, and Bromine Compounds on Cross-Appeal
4. 01/14/00 Defendants' Unopposed Motion to File an Addendum to the Previously Filed Answer/Opening Brief
5. 03/10/00 Third Brief of Appellants Gerardo Dennis Patrickson, et. al., on Cross-Appeal
6. 03/27/00 Reply Brief of Dead Sea Bromine, and Bromine Compounds
7. 05/30/01 Opinion
8. 06/12/01 Appellees Petition for Rehearing with Suggestion for Rehearing En Banc
9. 06/13/01 Appellees/Cross-Appellants Dead Sea Bromine, and Bromine Compounds Petition for Rehearing with Suggestion for Rehearing En Banc
10. 07/10/01 Order Denying Petitions for Rehearing and for Rehearing En Banc

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

GERARDO DENNIS PATRICKSON; RODOLFO BERMUDEZ ARIAS; BENIGNO TORRES HERNANDEZ; FERNANDO JIMENEZ ARIAS; MELGAR OLIMPIO MORENO; SANTOS LEANDROS; HERMAN ROMERO AGUILAR; ELIAS ESPINOZA MERELO HOOKER ERA CELESTINO; ALIKIO MANUEL MENDEZ and CARLOS HUMBERTO RIVERA, individually and on behalf of others similarly situated, Plaintiffs, vs. DOLE FOOD COMPANY, INC., et al., Defendants. DOLE FOOD COMPANY, INC. Defendant/Third-Party Plaintiff,	CIVIL NO. 97-4062-09 (Other Non-vehicle Tort) (Class Action) DEFENDANT DOLE FOOD COMPANY, INC.'S THIRD PARTY COMPLAINT; SUMMONS; CERTIFICATE OF SERVICE

vs.

DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED,

Third/Party Defendants.

DEFENDANT DOLE FOOD COMPANY, INC.'S THIRD PARTY COMPLAINT

Pursuant to Hawaii Rule of Civil Procedure 14 and within ten days after serving its original answer, defendant Dole Food Company, Inc. ("Dole") hereby files its third-party complaint complaining of Dead Sea Bromine Co., Ltd. and Bromine Compounds Limited ("Third-Party Defendants"), and respectfully shows the Court as follows:

I.

1. Third-Party defendant Dead Sea Bromine Co., Ltd. ("Dead Sea") is a foreign corporation incorporated in the State of Israel, "a majority of whose shares or other ownership interest [was] owned by a foreign state" during all times relevant to this lawsuit. See Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603(b)(2). As such, Dead Sea is "[a]n 'agent or instrumentality' of a foreign state" under the FSIA, 28 U.S.C. § 1603(b), and may be served with citation as provided by the FSIA. 28 U.S.C. § 1608.

2. Third-Party defendant Bromine Compounds Ltd. ("Bromine Compounds") is a foreign corporation incorporated in the State of Israel, "a majority of whose shares or other ownership interest [was] owned by a foreign state" during all times relevant to this lawsuit. See Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603(b)(2). As such,

Bromine Compounds is "[a]n 'agent or instrumentality' of a foreign state" under the FSIA, 28 U.S.C. § 1603(b), and may be served with citation as provided by the FSIA. 28 U.S.C. § 1608.

II.

3. Plaintiffs have sued defendants, including Dole, seeking to recover damages allegedly incurred as a result of their alleged exposure to dibromochloropropane ("DBCP") in their respective foreign countries. Plaintiffs allege that the DBCP to which they were exposed was manufactured, sold, distributed and used by various parties, including Dole. Plaintiffs, however, have named as defendants only certain manufacturers, sellers and distributors of DBCP.

4. During all times relevant to this lawsuit, the Third-Party Defendants were manufacturers and/or sellers and/or distributors of DBCP and sold to, among others, one or more of the defendants in this lawsuit.

5. To the extent, if any, that Plaintiffs were exposed to DBCP, such DBCP was, in whole or in part, manufactured, distributed and/or sold by the Third-Party Defendants. As a result, each of the Third-Party Defendants is a party who is or may be liable to Dole or to plaintiffs for all or part of Plaintiff's claims against Dole.

III.

6. Dole denies that it was negligent or that it committed any act contributing to or independently causing the harm complained of by Plaintiffs. Should the jury find otherwise, however, Dole is entitled to reimbursement from the Third-Party Defendants by way of contribution, indemnity or otherwise, in the amount of any judgment that may be rendered herein in favor of plaintiffs and against Dole.

WHEREFORE, Dole prays as follows:

A. That the Complaint herein be dismissed against it and that it have its costs and attorneys' fees;

B. That Dole have judgment in accordance with the law and the facts;

C. That if Plaintiffs or any of them is found entitled to judgment that such judgment be entered only against Third-Party Defendants;

D. That if Plaintiffs or any of them recovers judgment against Dole, that Dole have judgment over and against Third-Party Defendants; and

E. That the Court award Dole its costs and such other and further relief, legal and equitable, as the Court deems just and proper.

Dated: Honolulu, Hawaii: October 31, 1997

John R. Lacy, Esq.
Bruce L. Lamon, Esq.

Attorneys for Defendant
Dole Food Company, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERARDO DENNIS PATRICKSON; RODOLFO BERMUDEZ ARIAS; BENIGNO TORRES HERNANDEZ; FERNANDO JIMENEZ ARIAS; SANTOS LEANDROS; HERMAN ROMERO AGUILAR; ELIAS ESPINOZA) MERELO HOOKER ERA CELESTINO; ALIRIO MANUEL MENDEZ; and CARLOS HUMBERTO RIVERA, individually and on behalf of others similarly situated, Plaintiffs, vs. DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY; DOLE FRESH FRUIT INTERNATIONAL, LIMITED; DOLE FRESH FRUIT INTERNATIONAL, INC.; PINEAPPLE GROWERS ASSOCIATION OF HAWAII; AMVAC CHEMICAL CORPORATION; SHELL OIL COMPANY; DOW CHEMICAL COMPANY;	CIVIL ACTION NO. 97-01516 HG (Re Civil No. 97-4062-09, Circuit Court of the First Circuit, State of Hawaii) (Other Non-vehicle Tort) (Class Action) AMENDED COMPLAINT; DEMAND FOR JURY TRIAL; SUMMONS TO ANSWER CIVIL COMPLAINT

OCCIDENTAL CHEMICAL)
CORPORATION)
(individually and as successor)
to Occidental Chemical)
Company and Occidental)
Chemical Agricultural)
Products, Inc., Hooker)
Chemical and Plastics,)
Occidental Chemical)
Company of Texas and Best)
Fertilizer Company);)
STANDARD FRUIT)
COMPANY; STANDARD)
FRUIT AND STEAMSHIP)
COMPANY; STANDARD)
FRUIT COMPANY de)
COSTA RICA, S.A.;)
STANDARD FRUIT)
COMPANY de)
HONDURAS, S.A.;)
CHIQUITA BRANDS, INC.;)
CHIIQUITA BRANDS)
INTERNATIONAL, INC.)
(individually and as successor)
in interest to United Brands)
Company, Inc.); MARITROP)
TRADING CORPORATION;)
DEL MONTE FRESH)
PRODUCE, N.A.; DEL)
MONTE FRESH PRODUCE)
COMPANY; DEL MONTE)
FRESH PRODUCE)
HAWAII, INC.; DEL)
MONTE FRESH PRODUCE)
COMPANY AND FRESH)
DEL MONTE N.V.; JOHN)
DOES 1-10; JANE DOES 1-)

10; DOE PARTNERSHIPS 1-10; and DOE CORPORATIONS 1-10,

Defendants.

COMPLAINT

Plaintiffs above-named, by and through their attorneys Christian Hartley, Esq. and Ness Motley Loadholt Richardson and Poole, and James Krueger, Esq. and Damon Key Leong Kupchak Hastert, file this Complaint against the Defendants above-named and allege as follows:

I. PRELIMINARY STATEMENT

1. Plaintiffs are citizens of the countries of Costa Rica, Ecuador, Guatemala and Panama. The Plaintiffs, and those similarly situated people have had their health, welfare, and lives damaged as a result of exposure to an extremely hazardous chemical pesticide, dibromochloropropane ("DBCP"), made by some of the Defendants and used by others of the Defendants on their farms where the Plaintiffs worked.

2. This civil class action is brought by Plaintiffs to recover compensation for damages to their health, welfare, and lives that resulted from the injuries caused by the Defendants.

II. JURISDICTION

3. This Court has subject matter jurisdiction to hear the claims in this Complaint pursuant to Haw. Rev. Stat. § 603-21.5, personal jurisdiction over the Defendants pursuant to Haw. Rev. Stat. § 634-35 and venue over the claims in this Complaint pursuant to Haw. Rev. Stat. § 603-36.

III. PARTIES

4. The following Plaintiffs will serve as class representatives for the class represented in this case:

a. Plaintiffs Gerardo Dennis Patrickson, Rodolfo Bermudez Arias, Benigno Torres Hernandez, and Fernando Jimenez Arias are residents of the country of Costa Rica and were exposed to and injured by the chemical pesticide, dibromochloropropane (DBCP) in their home country;

b. Plaintiffs Herman Romero Aguilar and Elias Espinoza Merelo are residents of the country of Ecuador and were exposed to and injured by the chemical pesticide, dibromochloropropane (DBCP) in their home country;

c. Plaintiffs Alirio Manuel Mendez and Carlos Humberto Rivera are residents of the country of Guatemala and were exposed to and injured by the chemical pesticide dibromochloropropane (DBCP) in their home country; and

d. Plaintiffs Santos Leandros and Hooker Era Celestino are residents of the country of Panama and were exposed to and injured by the chemical pesticide dibromochloropropane (DBCP) in their home country. These representative Plaintiffs bring this civil class action on behalf of all workers similarly situated with claims arising out of exposure to the chemical pesticide DBCP.

5. Defendant Dole Food Company, Inc. is a Hawaii corporation doing business in the State of Hawaii and which, at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court. Dole Food Company, Inc. is the successor in interest to Castle & Cooke, Inc. and Standard Fruit & Steamship Company.

6. Defendant Pineapple Growers Association of Hawaii is a California corporation with its principal place of business in Hawaii. Pineapple Growers Association of Hawaii, at all times pertinent herein, was authorized to do and was doing

business within the jurisdiction of this Honorable Court. The Pineapple Growers Association of Hawaii is the successor in interest, alter ego and agent of the Pineapple Research Institute, the entity which developed and tested DBCP in Hawaii. The Pineapple Growers Association of Hawaii is the alter ego agent of Dole Food Co., Inc. and Del Monte Food Company, Del Monte Fresh Produce N.A., and Del Monte Fresh Produce Hawaii, Inc.

7. Defendant Dow Chemical Company is a Delaware corporation with its principal place of business in Michigan, and which, at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court.

8. Defendant Occidental Chemical Corporation is a New York corporation with its principal place of business in Texas, which, at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court.

9. Defendant Amvac Chemical Corporation is a California corporation with its principal place of business in California, which, at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court.

10. Defendant Shell Oil Company is a Delaware corporation with its principal place of business in Texas, which, at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court.

11. Defendant Dole Food Company, Inc. at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court. Dole Food Company, Inc. is the ultimate parent corporation of Standard Fruit Company, Standard Fruit and Steamship Company, Dole Fresh Fruit Company, Standard Fruit Company de Costa Rica,

S.A., Standard Fruit Company de Honduras, S.A., Dole Fresh Fruit International, Ltd., Dole Fresh Fruit International, Inc. (the "Dole Defendants"). These subsidiaries are so integrated and controlled by Dole Food Company, Inc. that they are the alter ego of Dole Food Company, Inc. The Plaintiffs are suing the Dole Defendants for the tortious activities performed at the behest and under the control of Dole Food Co., Inc.

12. Defendant Standard Fruit and Steamship Company is a Delaware corporation with its principal place of business in California, which, at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court. This corporation is the alter ego/agent of Dole Food Company, Inc., Standard Fruit Company, and/or Dole Fresh Fruit Company, and its foreign subsidiaries.

13. Defendant Standard Fruit Company is a Delaware corporation, with its principal place of business in Ecuador, which, at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court. This corporation is the alter ego/agent of Dole Food Company, Inc., Standard Fruit and Steamship Company, and/or Dole Fresh Fruit Company. Standard Fruit Company is the alter ego of its foreign subsidiaries.

14. Defendant Dole Fresh Fruit Company is a Nevada corporation with its principal place of business in California, which, at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court. Dole Fresh Fruit Company is an alter ego/agent of Standard Fruit Company, Standard Fruit and Steamship Company, Dole Food Company, Inc., Standard Fruit Company de Costa Rica, S.A., Standard Fruit Company de Honduras, S.A., Dole Fresh Fruit International, Limited, and Dole Fresh Fruit International, Inc. These subsidiaries are so integrated and controlled by Dole Fresh Fruit Company that they are the alter ego/agent of Dole Fresh Fruit Company.

15. Defendant Standard Fruit Company de Costa Rica, S.A. is a Costa Rican corporation with its principal place of business in Costa Rica, which, at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court through its alter ego/agent corporations, including Standard Fruit Company, Standard Fruit and Steamship Company, Dole Food Company, Inc., and Dole Fresh Fruit Company.

16. Defendant S andard Fruit Company de Honduras, S.A. is a Honduran corporation with its principal place of business in Honduras, which, at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court through its alter ego/agent corporations, including Standard Fruit Company, Standard Fruit and Steamship Company, Dole Food Company, Inc., and Dole Fresh Fruit Company.

17. Defendant Dole Fresh Fruit International, Limited is a Liberian corporation with its principal place of business in California, which, at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court through its alter ego/agent corporations, including Standard Fruit Company, Standard Fruit and Steamship Company, Dole Food Company, Inc., and Dole Fresh Fruit Company.

18. Defendant Dole Fresh Fruit International, Inc. is a Panamanian corporation with its principal place of business in California, which, at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court through its alter ego/agent corporations, including Standard Fruit Company, Standard Fruit and Steamship Company, Dole Food Company, Inc., and Dole Fresh Fruit Company.

19. Defendant Chiquita Brands International, Inc. is a New Jersey corporation with its principal place of business in Ohio, which, at all times pertinent herein, was authorized to do and

was doing business within the jurisdiction of this Honorable Court. Chiquita Brands International, Inc. is the ultimate parent of Chiquita Brands, Inc. and Maritrop Trading Corp. Chiquita Brands International, Inc. is the successor in interest to United Fruit Company and United Brands Company, Inc.

20. Defendant Chiquita Brands, Inc. is a Delaware corporation with its principal place of business in Ohio, which, at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court. Chiquita Brands, Inc. is the alter ego/agent of Chiquita Brands International, Inc. and successor in interest to United Fruit Company and United Brands Company, Inc.

21. Defendant Maritrop Trading Corporation is a Delaware corporation with its principal place of business in Mississippi. Maritrop Trading Corporation is the subsidiary and alter ego/agent of Chiquita Brands, Inc. and Chiquita Brands International, Inc.

22. Fresh Del Monte N.V. is a Netherland Antilles corporation with its principal place of business in Hawaii. Fresh Del Monte N.V. is the ultimate parent corporation of the International Fruit empire that is operated by Fresh Del Monte N.V.'s alter ego subsidiaries, Del Monte Fresh Produce N.A. and Del Monte Fresh Produce Hawaii Inc.

23. Defendant Del Monte Fresh Produce, N.A. is a Florida corporation with its principal place of business in Florida, which, at all times pertinent herein, was authorized to do and was doing business within the jurisdiction of this Honorable Court.

24. Defendant Del Monte Fresh Produce Company is a Delaware corporation and the parent and alter ego/agent of its subsidiaries, including those doing business in Hawaii. The Del Monte Defendants are subject to personal jurisdiction in Hawaii based on their own contacts with the State, the contacts of their agents and alter ego/agents. Del Monte Fresh

Produce N.A. and the other agents, subsidiaries and alter ego/agents of Del Monte Fresh Produce Company are part of the international fruit empire operated at the behest of the Del Monte Fresh Produce Company. As such the Del Monte Defendants are subject to personal jurisdiction based on the contacts of the numerous subsidiaries, alter egos and agents doing business and performing tortious actions in Hawaii.

25. Defendant Del Monte Fresh Produce Hawaii Inc. is a Hawaii Citizen because its principal place of business is Hawaii. Del Monte Fresh Produce Hawaii is a subsidiary of Del Monte Produce N.A. and Del Monte Fresh Produce Company. Del Monte Fresh Produce Hawaii Inc., Del Monte Produce N.A. and Del Monte Fresh Produce Company are subsidiaries, alter egos/agents of each other and are subservient to the ultimate parent's, Fresh Del Monte N.V., interests in the international fruit business.

26. Del Monte Fresh Produce Hawaii Inc., Del Monte Fresh Produce N.A., Del Monte Fresh Produce Company and Fresh Del Monte N.V. (The "Del Monte Defendants") are a part of the international fruit empire that had its roots in selling pineapples grown on plantations in Hawaii. The Del Monte Defendants, along with the Dole Defendants formed the Pineapple Growers Association of Hawaii (PGAH), the trade association whose research arm, the Pineapple Research Institute, developed and tested DBCP in Hawaii. The Del Monte Defendants and the Dole defendants were, at the time in question, in control of the PGAH such that they are liable for the activities of the PGAH.

27. The Del Monte Defendants, the Dole Defendants and the Chiquita Defendants are foreign citizens as well as U.S. citizens because they are the alter egos of their respective foreign subsidiaries involved in their respective international fruit growing and sourcing enterprises.

28. Defendants Dow Chemical Company, Occidental Chemical Corporation, Shell Oil Company, Standard Fruit

Company, Standard Fruit and Steamship Company, Dole Food Company, Inc, Dole Fresh Fruit Company, Standard Fruit Company de Costa Rica, S.A., Standard Fruit Company de Honduras, S.A., Dole Fresh Fruit International, Limited, Dole Fresh Fruit International, Inc., Chiquita Brands, Inc., Chiquita Brands International, Inc., and Del Monte Fresh Produce, N.A., their subsidiaries and/or affiliates, manufactured, sold, distributed, and used nematocides containing the chemical dibromochloropropane, commonly known as DBCP. Plaintiffs do not assert any claims, do not seek any damages, and expressly disclaim any recovery for any injuries arising out of exposure to DBCP or products containing DBCP designed, manufactured, marketed, or supplied by Dead Sea Bromine Co., Ltd., Ameribrom Inc., Bromine Compounds, Ltd., Israel Chemical Co., Ltd., Dead Sea Works, Ltd., Makhteshim Azan, the State of Israel, or any other foreign sovereign entity.

29. No Plaintiff in this action claims exposure to DBCP manufactured, sold, distributed, supplied, or designed by Dead Sea Bromine, Co., Ltd., Ameribrom Inc., Bromine Compounds, Ltd., Israel Chemical Co., Ltd., Dead Sea Works, Ltd., Makhteshim Azan, the State of Israel (collectively "Dead Sea"), or any other foreign sovereign entity. Discovery in other DBCP cases has shown conclusively that no Dead Sea DBCP product was ever used by Defendants Chiquita Brands, Inc., Chiquita Brands International, Inc., or Maritrop Trading Company, or Del Monte Fresh Produce, N.A., Del Monte Fresh Produce Hawaii Inc., Del Monte Fresh Produce Company and Fresh Del Monte N.V., or their affiliates, and that no such product was used by Defendant Standard Fruit Company or its affiliates prior to 1975. Accordingly, any Plaintiff who did not work for Standard Fruit Company or its affiliates after 1975 has no possibility of exposure to any Dead Sea product. Any Plaintiff who worked for Standard Fruit Company or its affiliates specifically and affirmatively disclaims any right to recovery for such exposure.

30. John Does 1-10, Jane Does 1-10, Doe Partnerships 1-10, and Doe Corporations 1-10 ("Doe Defendants") are sued under fictitious names because their names and identities are presently unknown to the Plaintiffs, except that they are persons and/or entities who are in the same manner presently unknown to the Plaintiffs and who engaged in the activities alleged herein; and/or are in some manner responsible for the injuries and damages to the Plaintiffs; and/or are persons who conducted some activity in a negligent, and/or wilful manner who failed to fulfill a duty or obligation, whose conduct or omission to act was a proximate cause of the injuries or damages to the Plaintiffs; and/or were in some manner related to the previously named Defendants engaged in the activities alleged herein; and Plaintiffs ask to insert their true names and capacities, activities and/or responsibilities, whether individual or corporate, when their names are ascertained.

31. Plaintiffs, on information and belief, allege that Standard Fruit Company, Standard Fruit and Steamship Company, Standard Fruit Company de Costa Rica, S.A., Standard Fruit Company de Honduras, S.A., Dole Food Company, Inc., Dole Fresh Fruit Company, Dole Fresh Fruit International, Limited, Dole Fresh Fruit International, Inc., Chiquita Brands, Inc., Chiquita Brands International, Inc. (individually and as successor in interest to United Brands Company, Inc.), Maritrop Trading Corporation, Del Monte Fresh Produce Company, Del Monte Fresh Produce, N.A., Del Monte Fresh Produce Hawaii Inc., Del Monte Fresh Produce Company and Fresh Del Monte N.V. and the Pineapple Growers Association of Hawaii ("the Grower Defendants") performed many of the tortious acts described below through their predecessors and/or alter ego/agent corporations, both foreign and domestic.

32. Plaintiffs, on information and belief, allege that Amvac Chemical Corporation, Shell Oil Company, Dow Chemical Company, and Occidental Chemical Corporation ("the Manufacturer Defendants") performed many of the tortious

acts described below through their predecessors and/or alter ego/agent corporations, both foreign and domestic.

33. The Plaintiffs allege that they were exposed to Defendants' products between 1959 and the present, and as a result, have suffered serious and permanent injuries including, but not limited to, severe injury to their reproductive capacities. The Plaintiffs were diagnosed with injuries related to DBCP exposure less than 2 years prior to filing this Complaint (or a complaint in another jurisdiction tolling the statute of limitations), and did not discover and could not have discovered this injury and its cause prior to that time.

34. The Plaintiffs were employed by American fruit companies, their subsidiaries or agents in the Plaintiffs' native countries. The Plaintiffs were exposed to the Defendants' DBCP products while employed in the commercial cultivation of bananas for sale by American corporations in the United States.

35. The Plaintiffs claim damages (including compensatory damages, punitive damages and other damages, if any) that exceed the minimal jurisdictional amount required by this Court.

IMPROPER VENUE AND INSUFFICIENCY OF SERVICE OF PROCESS.

BACKGROUND

36. Defendants used DBCP from approximately the 1960's until the mid-1980's. Workers in the banana growing regions of Costa Rica, Ecuador, Guatemala, Panama and other countries injected DBCP into the soil to protect against microscopic worms called nematodes that dwell in cultivated soils. The laborers wore no gloves, protective covering, or respiratory equipment to prevent skin absorption or inhalation because no one informed them that they were in danger, and because typically no protective clothing was provided to the Plaintiffs and those similarly situated by the Defendants.

Unknown to the workers, however, each breath taken during the daily hours of mixing and injecting DBCP became a health hazard. The fumes released by the chemical remained trapped within the banana canopy created by the oversized banana leaves, which cut off almost all ventilation. Workers were also exposed through their skin when DBCP splashed on them in the course of refilling their canisters, or when their injectors hit rocks or other objects. Many workers absorbed so much DBCP each day that their urine would give off the smell of the chemical at night.

A. *Effects - Sterility*

37. The affected workers suffer from a type of sterility known as germinal cell aplasia. Simply put, their bodies produce little or no sperm. Men whose cells produce no sperm are termed azoospermic; men who produce fewer sperm than normal are oligospermic. Even a man with a normal count may have slow moving, deformed, or stunted sperm. In any case, such a man is extremely unlikely to father a healthy, normal child.

B. *Cancer*

38. The United States Environmental Protection Agency lists DBCP as a probable human carcinogen. The National Cancer Institute ("NCI") lists DBCP as one of the most potent known carcinogens. NCI tests demonstrate that DBCP induces cancer in a wide range of organs and sites, generally at the lowest doses tested. Studies of the exposed workers have demonstrated excess cancer rates.

C. *Birth Defects*

39. DBCP has been linked to a variety of birth defects, and is a suspected cause of miscarriages in exposed women. In Costa Rica and other countries, women working on plantations have reported several consecutive miscarriages.

D. *Environmental Harm*

40. Environmentally, DBCP is regarded as a highly persistent and mobile pesticide. DBCP decomposes slowly in soil with studies showing DBCP to remain in soils for years and it is able to migrate through certain soils. DBCP has been widely found as a contaminant in ground and surface water in Hawaii, elsewhere in the United States and abroad. It is highly chemically stable in water, even in very small amounts. It has also been reported as a low level air contaminate. In California, municipalities have recovered hundreds of millions of dollars from Dow Chemical Company, Shell Oil Company, Occidental Chemical Corporation and Amvac for costs related to the clean-up of DBCP contaminated water supplies. Recently, these Defendants paid large settlements to several communities for groundwater contamination from DBCP. Litigation has been filed on Maui against many of these same Defendants over contamination of drinking water wells containing DBCP over the maximum contaminant level ("MCL"). *See Board of Water Supply of the County of Maui v. Shell Oil Company. et al.,* Civil No. 97-00304DAE. The MCL for DBCP in drinking water is 2 parts per billion and the EPA's goal for water systems, because of DBCP's strong carcinogenic nature, is zero contamination.

E. *Testing For Hazards*

41. What little pre-market toxicology research was done on DBCP was conducted in or around 1958, by the Defendant Dow's company doctor, Dr. Ted Torkelson, and by Defendant Shell's consultant, Dr. Charles Hine of the University of California Medical School in San Francisco. In testing of DBCP on rats, both labs found DBCP caused retarded growth, organ damage, shrunken testes, and sterility.

In an April 1958 "confidential report," Dr. Hine wrote that "among the rats that died, the gross lesions were especially prominent in lungs, kidneys, and testes. Testes were usually extremely atrophied." Dow's first in-house report came three

months later, in July 1958, and concluded that DBCP was "readily absorbed through the skin and high in toxicity in inhalation." Dow's data also showed that "liver, lung and kidney effects might be expected" and that "testicular atrophy may result from prolonged, repeated exposure." This information, of course, should have stopped the development of DBCP before it was ever sold. Decades later, when American factory workers producing DBCP were found to be sterile and doctors in Costa Rica began to diagnose sterility in hundreds of plantation workers, the health officials would wonder why Dow and Shell would have sold a product knowing that "testicular atrophy may result from prolonged, repeated exposure." In fact, both companies had begun producing DBCP commercially even before the studies were completed.

In 1961, a joint Dow-Shell report on the hazardous effects of DBCP was published in *Toxicology and Applied Pharmacology*. Although this data was published in an academic journal, the information contained in the report never appeared in technical data sheets (the forerunners to today's material safety data sheets, or MSDSs), nor did it lead to adequate warnings of DBCP's hazards.

F. *USDA Registration: 1961*

42. Hine, by now working jointly for Dow and Shell, drafted a report in support of FDA registration in May of 1961 calling for work place concentrations of DBCP to be kept under one part per million ("ppm"), and recommending impermeable protective clothing if skin contact was likely. Louis Lykken, in charge of government registration of chemicals for Shell, commented that the suggestion was "impractical." To Hine's observation that repeated exposure could affect human reproduction, Lykken made the company's priorities clear: "Leave out speculation about possible harmful conditions to man. This is not a treatise on safe use."

G. *Product Labeling*

43. In 1961, a USDA registration official wrote Shell upon receipt of the company's proposed labels, stating that "in view of the testicular atrophy demonstrated to occur in experimental animals, we would like to have information regarding health records of those individuals who have been employed for an extended period in the manufacture or formulation of products containing DBCP." A flurry of memos ensued. The following excerpts from Shell documents demonstrate Shell's management's attitude:

> August 21, 1961: "We have discussed with Dr. Zavon USDA's precautionary labeling and the hazards associated with this pesticide chemical. He shares our opinion that USDA is being over cautious in their views on labeling products containing this pesticide chemical. It is the consensus that Dr. Zavon and a representative of Dow's toxicology group should meet with the USDA toxicology section representatives to settle this issue."
>
> August 29, 1961: "We have just received and reviewed the subject technical bulletin [and information brochure on Nemagon (Shell's flagship product)] and have some reservations with regard to the adequacy of the statements under safety precautions. In light of the fact that the threshold of odor detection has been reported at one point at seven parts per million and the lowest level studied [five parts per million] has demonstrated damage after repeated exposures, it appears the statement "there is a good margin of safety in handling" would be difficult to justify and might be prosecuted as negligent."
>
> November 9, 1961: "The pesticides regulations branch of the U. S. Department of Agriculture has expressed concern over the hazards associated with the use of Nemagon soil fumigant and proposed stringent labeling for the various formulations now being marketed. It is the consensus in the division office that the USDA is being overly cautious and

> the precautionary statements proposed could have an adverse affect on the sale of this product. This matter has been discussed with the USDA representatives and they are willing to relax their labeling requirements if we can provide them with a history of safe use experience in the field and in the manufacturing plant."

Dow was similarly cavalier when it considered the effects that warning about testicular atrophy might have on sales of DBCP. DBCP was entered in the toxicology card file in Dow's medical library. The toxicology card for Dow's flagship product, Fumazone, noted eye and skin affects, and stated that testicular damage "may result from chronic exposure to active material." Liver and kidney damage were also discussed, but *the toxicology cards were soon altered to delete information on testicular damage.* Dr. Torkelson would later make the excuse that "the cards addressed singular exposures, and you don't see testicular changes on single exposures. It was put on some of the cards because whoever wrote it knew about it and thought it was important enough to put it on there along with liver and kidney affects. When it was retested, the testes didn't show an affect from a single exposure, and a new card was made out."

H. *Central American Trial And Full Scale Use*

44. Just a few years later, DBCP trials began on the Standard Fruit Company's Central American plantations. William Liebhard, now a professor of agriculture at the University of California-Davis and then a young scientist with Standard Fruit in Honduras, recalled:

> In the DBCP trials, toxicological analyses were not undertaken on the potential affects of those chemicals on user's health or in the environment. . . . We did not consider such factors at all at that time frame. . . . While working, all of us never used any kind of safety equipment in those days.

All throughout Costa Rica, and at Standard Fruit plantations around the world, warehouse mixers, field applicators and irrigation tower workers had regular, heavy exposure to DBCP through vapor inhalation and skin absorption. Standard Fruit's production manual contained no warnings of the testicular affects of DBCP, and did not advise the use of safety gear and precautions. An official of the Instituto Nacional de Seguros has stated that none of the workers, captains or field managers knew about the hazards and the necessary precautions for handling DBCP. The labels on Fumazone certainly did not tell them, and workers throughout the world invariably state that no warning of the product's dangers was ever given.

In a March 3, 1978, memorandum regarding DBCP safe handling procedures, Dr. Jack Dement, the director of Castle & Cooke, Inc.'s worldwide pest control efforts, commented on Dow's suggestions that DBCP should not be applied unless the treated area is a safe distance away from worker housing and work areas or all people have been evacuated from those surrounding areas. Dr. Dement stated:

> *This is not operationally feasible and does not need to be implemented.* . . . I am fully aware that enforcement of all these safety precautions is well nigh impossible. It is important however that we make a best effort at least to the extent that we have this equipment available.

Dr. Dement's memo went on to indicate that *only personnel working at the DBCP pump, rather than applicators, should be provided respiratory devices for the protection against DBCP vapors.* Furthermore, the Manufacturing Defendants were aware that the Grower Defendants were not providing the recommended safety measures. Dr. Dement's memorandum demonstrates the level of concern that the Defendants had for the safety of the workers.

I. *Banning And Exportation*

45. In the United States, DBCP had by 1975 been termed a suspected carcinogen by the EPA. In July 1977, thirty-five of one hundred fourteen workers manufacturing DBCP at Occidental's California plant were found to be sterile. One month later, the EPA banned DBCP from all but a few uses in Hawaii. Even in Hawaii, use was permitted only under heavily restricted conditions with extensive protective equipment. Finally, in 1979, the EPA canceled the registration for DBCP for all uses. Unfortunately, the large scale use of DBCP on pineapple plantations in the islands has led to extensive groundwater contamination in Hawaii.

The U.S. ban on manufacturing of DBCP, however, did not prevent the Defendants from exporting DBCP. Dow, Shell and Occidental still had stocks to sell. When Dow informed Standard that it planned to halt sales and wait for EPA test results, Standard threatened to sue, complaining that "your halt of shipping our outstanding orders is viewed as a breach of contract." Dow relented after Standard agreed to indemnify it against claims for injuries resulting from DBCP use. Sales resumed with Dow officials rationalizing that profits could be made as long as someone else paid for the damage.

This controversy even became the focus of hearings in the United States Senate:

> [I]ndustry studies. . . were kept secret from domestic chemical company employees and from agricultural workers using DBCP in the field. Now, tragically, twenty years later, the sterilization that had been predicted by laboratory tests became a reality - increasing numbers of workers in the manufacturing plants and banana fields found they could not have children. EPA finally banned DBCP from nearly all domestic farm uses, but the companies then dumped their unused stocks overseas where it continued to be used. As a result, more banana workers in

> Costa Rica were sterilized. The tale of DBCP is an appalling one.

Senator J. Leahy, Circle of Poison: Impact of U. S. Pesticides on Third World Workers, Hearings before the Committee on Agriculture, Nutrition, and Forestry, 102 Cong., First Sess. 1 (June 5, 1991). When available stocks of DBCP began to be exhausted, Castle and Cooke, Inc. (now known as Dole Foods, Inc.) entered into negotiations with Dow to arrange for Dow to set up a DBCP plant to be run by Castle & Cooke, Inc. outside the United States. Thus, despite all the known hazards of DBCP and the damage done to those workers occupationally exposed to DBCP, Castle & Cooke, Inc. continued to look for a way to circumvent the health related ban on production of DBCP in the United States.

V. CLASS ACTION ALLEGATIONS

46. The named Plaintiffs bring this action as a class action under Fed.R.Civ.P. 23(a) and 23(b)(3) on behalf of themselves and others similarly situated who have been exposed to and injured by the chemical pesticide, dibromochloropropane.[1]

47. Plaintiffs are members of the class they seek to represent.

48. The members of the class are so numerous that joinder is impracticable and would involve thousands of litigants.

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[1] Plaintiffs have filed a Motion to Remand this case. Plaintiffs file this amended complaint subject to, and without waiving, their Motion to Remand. This Court does not have jurisdiction. However, because Plaintiffs' case has been removed, they file this amended complaint to correct errors in the original complaint and clarify certain allegations. For purposes of this Court's consideration, the Plaintiffs have changed the class action allegations to conform to the Federal Rules of Civil Procedure. Upon remand, the Plaintiffs will move for a similar amendment of the complaint, but under the Hawaii Rules of Civil Procedure. Plaintiffs' filing of this amended complaint in no way constitutes a waiver of their Motion to Remand.

49. There are questions of law and fact common to the class including, but not limited to:

a. Whether Defendants designed, manufactured, marketed, sold, and/or distributed a defective product;

b. Whether exposure to DBCP causes injury;

c. Whether Defendants are strictly liable for sale of a defective product;

d. Whether Defendants acted negligently in manufacturing, formulating, marketing, distributing, instructing in the use of, supervising the use of, and promoting, selling and using DBCP;

e. Whether Defendants conducted, either directly or indirectly, appropriate testing of the DBCP;

f. Whether the Defendants' conduct amounted to a conspiracy that injured the Plaintiffs;

g. Whether Defendants failed to adequately warn of the adverse effects of DBCP as compared to other nematocides and methods of controlling nematodes;

h. Whether Plaintiffs will need future medical treatment;

i. Whether Defendants are liable for punitive damages; and

j. Whether the Defendants conspired to injure the Plaintiffs.

50. The claims of the named Plaintiffs are typical of the claims of the class in that the named Plaintiffs and the members of the class used DBCP designed, manufactured, supplied, distributed, sold and/or placed in the stream of commerce by Defendants, and did suffer or may suffer harm as a result.

51. Plaintiffs will fairly and adequately represent and protect the interests of the members of the class. Plaintiffs have retained counsel competent and experienced in complex class actions and products liability litigation.

52. Class certification is appropriate under Fed.R.Civ.P. Rule 23(b)(3) because common issues of law and fact relative to the design, manufacture, testing, warning, marketing, and use of DBCP, and the onset of injury from such use of DBCP predominate over individual issues. A class action is superior to other available methods for the fair and efficient adjudication of this litigation because individual joinder of all members of the class is impracticable.

53. Class certification is also appropriate pursuant to Fed. R.Civ.P.23(b)(1) because prosecution of separate actions would create a risk of adjudications with respect to individual members of the class which may, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

VI. FOR A FIRST CAUSE OF ACTION - NEGLIGENCE

54. All relevant allegations and facts set forth in the preceding paragraphs are realleged and incorporated by reference herein where applicable.

55. Defendants had a duty to exercise reasonable care in the manufacture, sale, distribution, use, and/or placement of DBCP into the stream of commerce, including a duty to assure that the product did not cause exposed workers to suffer from unreasonable, dangerous adverse health effects. Defendants failed to exercise ordinary care in the manufacture, sale, testing, quality assurance, quality control, use, and/or distribution of DBCP into the stream of commerce in that Defendants knew or should have known that the product DBCP created a

high risk of unreasonable, dangerous adverse health effects, some of which are life threatening.

56. The illnesses and disabilities of the Plaintiffs are a direct and proximate result of the negligence of the above-named Defendants, in that these Defendants produced, sold, or otherwise placed DBCP-containing materials into the stream of commerce, causing the Plaintiffs' exposure to the DBCP which the Defendants knew, or in the exercise of ordinary care ought to have known, would be deleterious and harmful to the Plaintiffs' health and well-being. The named Defendants were negligent and/or grossly negligent in one, some or all of the following respects, among others, which were the proximate cause of the Plaintiffs' illnesses and disabilities:

k. in shipping DBCP or DBCP-containing products to Plaintiffs' country of residence from ports in the United States including ports in Hawaii, when Defendants knew or reasonably should have known that the Plaintiffs would use the shipments of DBCP and that such use was substantially certain to cause the injuries of which Plaintiffs now complain;

l. in failing to adequately warn the Plaintiffs and the public of the dangerous characteristics of DBCP and the hazards of exposure to it, or to cause their subsidiaries or affiliates to do so;

m. in failing to provide the Plaintiffs with information as to what would be reasonably safe protective clothing and proper protective equipment and apparatuses, if in truth there were any, to protect the Plaintiffs from harm and disability from exposure to DBCP, or to cause their subsidiaries or affiliates to do so;

n. in failing to place adequate warnings in the Plaintiffs' native language on the containers of DBCP-containing materials to warn of the health hazards of coming into contact with DBCP, or cause their subsidiaries or affiliates to do so;

o. in failing to take reasonable precautions or exercise reasonable care to publish, adopt and enforce a safety plan for a safe method of handling and applying DBCP, or to cause their subsidiaries or affiliates to do so;

p. in failing to adequately supervise and instruct the Plaintiffs in the safe and proper application of DBCP-containing products, or to cause their subsidiaries or affiliates to do so;

q. in failing to implement proper methods and techniques of application of the products, or to cause such implementation, or to cause their subsidiaries or affiliates to do so;

r. in failing to instruct the Plaintiffs in and enforce the wearing of adequate protective clothing and equipment during application of the products or to cause such enforcement, or to cause their subsidiaries or affiliates to do so;

s. in failing to utilize a substitute material for DBCP in the nematocide, or to cause their subsidiaries or affiliates to do so;

t. in failing to test DBCP prior to releasing these products for sale to determine safe methods of handling or to cause their subsidiaries or affiliates to do so;

u. in failing to reveal the results of tests conducted on DBCP to the Plaintiffs, public health and safety officials or the public, or to cause their subsidiaries and/or affiliates to do so, and in concealing from the Plaintiffs information concerning the observed effects of the products on the Plaintiffs and their co-workers;

v. in failing to adequately monitor the health of the Plaintiffs and their co-workers exposed to the products;

w. in failing to use due care in designing and manufacturing DBCP so as to avoid the aforementioned risks

to individuals when DBCP was being used for nematode control;

x. in failing to conduct adequate pre-market and laboratory testing and post-marketing surveillance to determine the safety of DBCP;

y. in failing to provide adequate training to fruit company medical care providers so that health care providers were aware of the health dangers posed to the workers exposed to DBCP;

z. in marketing, supplying and using DBCP—which it knew to have serious, dangerous side effects and which effects it knew or should have known to be permanent—despite the side effects and in failing to adequately test for carcinogenic, mutagenic and teratogenic potential or other adverse health effects, such conduct amounting to negligence, to gross negligence, indifference and callous disregard of public health, and wilful and wanton conduct, so as to expose Defendants to the payment of punitive damages; and

aa. were otherwise careless or negligent.

57. The Plaintiffs further allege that Defendants and their agents, subsidiaries and/or predecessors are liable to the Plaintiffs individually and on the alternative liability theory, "alter ego", and/or successor liability theories. The Plaintiffs allege that the agents, employees, managers, officers, superintendents and/or servants of these Defendants carried out the acts and omissions described herein in the course of their employment for these and other named Defendants in the furtherance of a common corporate course or purpose.

58. The Plaintiffs assert negligence claims against only those Defendants named in this Complaint. The Plaintiffs do not assert any negligence claims because of exposure to DBCP or DBCP-containing products, designed, manufactured, formulated, marketed, distributed, or used by Dead Sea Bromine Co., LTD., Bromine Compounds, LTD., Ameribrom,

Inc., Israel Chemical Co., LTD., Dead Sea Works, LTD., the State of Israel, or any entity owned by the State of Israel or any entity owned or controlled, all or in part, by any foreign sovereign.

VII. FOR A SECOND CAUSE OF ACTION - CONSPIRACY

59. Plaintiffs allege all relevant allegations in the preceding paragraphs and incorporate them by reference herein where applicable.

60. Plaintiffs further allege that the named Defendants and/or their predecessors in interest, their subsidiaries and/or affiliates, knowingly agreed, contrived, combined, confederated and conspired among themselves and with others to cause the Plaintiffs' injuries, illnesses, and diseases by exposing the Plaintiffs to harmful and dangerous DBCP-containing products and to deprive the Plaintiffs of the opportunity of informed free choice as to whether to use the DBCP-containing products and to expose themselves to the dangers. Defendants committed the above-described wrongs by willfully misrepresenting and suppressing the truth as to the risks and dangers associated with the use of and exposure to Defendants' DBCP-containing products. Each of the Defendants aided and abetted the other Defendants in committing the tortious acts that caused the Plaintiffs' injuries.

61. In furtherance of these conspiracies, Defendants performed the following overt acts, among others:

bb. For many years, Defendants, individually, jointly and in conspiracy with each other, possessed medical and scientific data, and test reports which clearly indicated that DBCP-containing products were unreasonably dangerous, hazardous, deleterious, carcinogenic, mutagenic, teratogenic and potentially deadly;

cc. despite medical and scientific data, literature and test reports possessed by or available to Defendants,

Defendants individually, jointly and in conspiracy with each other, fraudulently, willfully and maliciously:

(1) withheld, concealed and suppressed the medical and scientific data, literature and test reports regarding the risks of DBCP-containing products from the workers who were exposed to them and using them, the public, and the agricultural community;

(2) caused to be released, published, and disseminated medical and scientific data, literature, and test reports containing information and statements regarding the risks of DBCP-containing products which Defendants knew were incorrect, incomplete, outdated, and misleading;

(3) distorted the results of medical examinations conducted upon the Plaintiffs, or workers such as the Plaintiffs, who were using DBCP-containing products and being exposed to the products by falsely stating and/or concealing the nature and extent of the harm which the Plaintiffs, or workers such as the Plaintiffs, had suffered.

dd. by the false and fraudulent representations, omissions, and concealments set forth above, the named Defendants individually, jointly, and in conspiracy with each other, intended to induce the Plaintiffs to rely upon the false and fraudulent representations, omissions, and concealments and to continue to expose themselves to the dangers inherent in the use of and exposure to Defendants' DBCP-containing products.

62. The Plaintiffs and others, reasonably and in good faith, relied upon the false and fraudulent representations, omissions, and concealments made by the Defendants regarding the nature of the DBCP-containing products.

63. As a direct and proximate result of the Plaintiffs' and others' reliance on the Defendants' false and fraudulent representations, omissions, and concealments, the Plaintiffs have sustained damages and injuries as described herein.

64. The Plaintiffs assert conspiracy claims against only those Defendants named in this Complaint. The Plaintiffs do not assert any conspiracy claims because of exposure to DBCP or DBCP-containing products, designed, manufactured, formulated, marketed, distributed or used by Dead Sea Bromine, Co., LTD., Bromine Compounds, LTD., Ameribrom, Inc., Israel Chemical Co., LTD., Dead Sea Works, LTD., the State of Israel, or any entity owned by the State of Israel or any other foreign sovereigns.

VIII. FOR A THIRD CAUSE OF ACTION - STRICT LIABILITY

65. Plaintiffs reallege all relevant allegations in the preceding paragraphs and incorporate them by reference herein where applicable.

66. Defendants are manufacturers and/or suppliers of DBCP. The DBCP manufactured and/or supplied by Defendants was defective in design or formulation in that, when it left the hands of the manufacturer and/or suppliers, the foreseeable risks exceeded the benefits associated with the design or formulation.

67. Alternatively, the DBCP manufactured and/or supplied by Defendants was defective in design or formulation, in that, when it left the hands of the manufacturer and/or suppliers, it was unreasonably dangerous because it was more dangerous than an ordinary consumer would expect, unreasonably dangerous and more dangerous than other alternatives.

68. The DBCP-containing products that were used in proximity to and applied by the Plaintiffs were designed, manufactured, formulated, and/or distributed by named Defendants and subsequently sold, directly and indirectly to the Plaintiffs or to Plaintiffs' employers. The products left the possession and control of Defendants in a defective and unreasonably dangerous condition in the following respects:

ee. the DBCP-containing products did not contain an adequate and timely warning in the Plaintiffs' language regarding the serious health hazards associated with DBCP;

ff. the products did not contain an adequate and timely warning concerning safety precautions and the need for protective equipment when working with DBCP;

gg. the products were defectively designed in that they contained DBCP, although a substitute for this chemical was available at all times material to this litigation;

hh. the DBCP products were unreasonably dangerous per se;

ii. the substance of the warning on the approved labels was inadequate because the approval of the labels was based on false, fraudulent and misleading information supplied to the regulatory agencies responsible for approving the labels; and

jj. the DBCP manufactured and/or supplied by Defendants was defective due to inadequate post-marketing warning or instruction because, after the manufacturer knew or should have known of the risk of injury from DBCP, it failed to provide adequate warnings to users or consumers of the product and continued to promote the product.

69. As the proximate cause and legal result of the defective condition of DBCP as manufactured and/or supplied by Defendants, and as a direct and legal result of the negligence, gross negligence, recklessness, carelessness, other wrongdoing and/or action(s) of Defendants described herein:

kk. Plaintiffs have been injured in health, strength and activity and suffered injuries to body and mind. All of these injuries have caused Plaintiffs past, present and future injuries and damages. The Plaintiffs have suffered shrunken testicles, eye damage, physical impairment, anxiety, distress, fear, pain, suffering, mental anguish, and distress secondary to the injury

and damages; Plaintiffs have suffered other injuries, the exact nature and extent of which are not fully known at this time;

ll. Plaintiffs have sustained and will continue to sustain economic loss, including loss of earnings and diminution or loss of earning capacity, the exact amount of which is presently unknown;

mm. Plaintiffs require reasonable and necessary health care, attention and services and have incurred medical, health, incidental and related expenses. Plaintiffs are informed and believe and, therefore, allege they will in the future be required to obtain medical and/or hospital care, attention, and services in amounts that are as yet undetermined.

70. The named Defendants are and were engaged in the business of manufacturing and/or distributing such DBCP-containing products, and these products, without substantial change in their condition after they were sold, were a proximate cause of the injuries and damages sustained by the Plaintiffs.

71. The Plaintiffs were unaware of the dangerous properties of DBCP which rendered the DBCP-containing products unsafe for their intended use. The Plaintiffs used the DBCP-containing products in a manner that was reasonably anticipated by the Defendants. Further, during the periods that the Plaintiffs were exposed to the products of the named Defendants, the products were being utilized in a manner which was intended by the Defendants.

72. The Plaintiffs assert strict liability claims against only those Defendants named in this Complaint. Plaintiffs do not assert any strict liability claims because of exposure to DBCP or DBCP-containing products designed, manufactured, formulated, marketed, distributed or used by Dead Sea Bromine Co., LTD., Bromine Compounds, LTD., Ameribrom, Inc., Israel Chemical Co., LTD., Dead Sea Works, LTD., the State of Israel, or any entity owned by the State of Israel.

IX. FOR A FOURTH CAUSE OF ACTION - INTENTIONAL TORT

73. Plaintiffs reallege all relevant allegations in the preceding paragraphs and incorporate them by reference herein where applicable.

74. The injuries and damages of the Plaintiffs are also due to the intentional malfeasance of Defendants and/or their subsidiaries and/or affiliates and are the direct and proximate result of these Defendants' volitional acts. Each of these Defendants knew of the dangers caused by the DBCP-containing products, yet knowingly, consciously and with substantial certainty of the consequences of their actions proximately caused the Plaintiffs' injuries in the following respects:.

nn. Defendants knowingly concealed information concerning the observed health effects of DBCP or DBCP-containing products from the Plaintiffs, the United States and foreign governments, and the medical, scientific and agricultural communities;

oo. Defendants knew of the hazards posed by DBCP-containing products, yet, they intentionally exposed Plaintiffs to DBCP products in operations involving the Plaintiffs and/or sold and distributed those DBCP products for use involving the Plaintiffs;

pp. Defendants knew of the hazards to the Plaintiffs posed by DBCP-containing products and by the methods of application utilized, yet, they continued to use these methods and/or allow others to continue to use these methods;

qq. Defendants knew of the hazards to the Plaintiffs posed by DBCP-containing products, yet, they failed to provide adequate protective clothing and equipment to the Plaintiffs and/or to take steps to ensure the Plaintiffs were provided adequate protection;

rr. Defendants knew of the hazards to the Plaintiffs posed by DBCP-containing products, yet, they did not instruct consumers of the product, including the Plaintiffs, in proper application techniques; and

ss. Defendants continued to sell, purchase and use DBCP-containing products after their use was suspended or banned by the United States government and, therefore, after Defendants were indisputably on notice of DBCP's dangerous properties.

75. The Plaintiffs further allege that Defendants are liable to the Plaintiffs for continuing harm resulting from the following volitional acts of these Defendants:

tt. knowingly concealing from the Plaintiffs knowledge of the existence, nature and severity of their injuries; and

uu. knowingly failing to take steps to enable, alert or cause the Plaintiffs to seek medical treatment for their injuries.

76. The Plaintiffs do not assert any intentional tort claims because of exposure to DBCP or DBCP-containing products designed, manufactured, formulated, marketed, distributed, or used by Dead Sea Bromine Co., LTD., Bromine Compounds, LTD., Ameribrom, Inc., Israel Chemical Co., LTD., Dead Sea Works, LTD., the State of Israel, or any entity owned by the State of Israel or other foreign sovereign entity.

X. FOR A FIFTH CAUSE OF ACTION - BREACH OF IMPLIED WARRANTY

77. Plaintiffs reallege all relevant allegations in the preceding paragraphs and incorporate them by reference herein where applicable.

78. The Defendants impliedly warranted that their DBCP-containing products were of good and merchantable quality and fit for their intended use. The Plaintiffs would show that they worked in close proximity to the DBCP-containing

products of the Defendants and the Defendants knew or ought to have reasonably anticipated these working conditions. The Defendants breached their implied warranty that their DBCP products were of good and merchantable quality and were fit for their particular intended use by causing the Plaintiffs' exposure to DBCP which was a proximate and producing cause of their injuries.

79. The Plaintiffs do not assert any breach of warranty claims because of exposure to DBCP or DBCP-containing products designed, manufactured, formulated, marketed, distributed, or used by Dead Sea Bromine Co., LTD., Bromine Compounds, LTD., Ameribrom, Inc., Israel Chemical Co., LTD., Dead Sea Works, LTD., the State of Israel, or any entity owned by the State of Israel or other foreign sovereign entity.

XI. COMPENSATORY DAMAGES

80. As a direct and proximate result of Defendants tortious conduct, the Plaintiffs have been rendered sterile, infertile, developed sexual and reproductive abnormalities, and/or are subject to an increased risk of cancer and other related conditions and have been damaged in some or all of the following particulars for which they have brought suit;

vv. The Plaintiffs have suffered great physical pain and suffering, mental anguish and emotional distress, and will continue to suffer great pain of body and mind throughout their lives;

ww. because of the Plaintiffs' exposure to DBCP-containing products, the Plaintiffs have suffered an extraordinarily increased risk of developing serious illness, including leukemia, or cancer of the testes, kidneys, liver and gastrointestinal tract. To detect the early onset of such diseases, the Plaintiffs will incur substantial expenses for medical testing, evaluation, examination, and other related expenses. These expenses would have been unnecessary if the Plaintiffs had not been wrongfully exposed to DBCP-

containing products. The Plaintiffs' need for liquidated damages for the costs of future medical expenses is reasonable in light of the following:

(1) the Plaintiffs have suffered significant exposure to Defendants' DBCP-containing products;

(2) DBCP-containing products are so toxic and hazardous to human health that the U.S. government has banned their use;

(3) diseases caused by DBCP-containing products are serious and often fatal;

(4) Plaintiffs have a significantly increased risk for developing such diseases; and

(5) early detection and diagnosis of diseases caused by DBCP-containing products will improve the prospects for cure, treatment, and minimization of pain and disability;

xx. the Plaintiffs have suffered an extraordinarily increased risk of genetic damage as a result of their exposure to Defendants' DBCP-containing products;

yy. the Plaintiffs have suffered and will suffer a loss of earning capacity;

zz. the Plaintiffs have lost capacity to enjoy life and will continue to suffer such loss in the future due to their exposure to Defendants' products.

81. The Plaintiffs assert claims against only those Defendants named in this Complaint. The Plaintiffs do not assert any claims for compensatory damages because of exposure to DBCP or DBCP-containing products designed, manufactured, formulated, marketed, distributed, or used by Dead Sea Bromine Co., LTD., Bromine Compounds, LTD., Ameribrom, Inc., Israel Chemical Co., LTD., Dead Sea

Works, LTD., the State of Israel, or any entity owned by the State of Israel.

82. The Plaintiffs claim damages (including compensatory damages, punitive damages and other damages, if any) that exceed the minimal jurisdictional amount required by this Court.

XII. PUNITIVE DAMAGES

83. Plaintiffs reallege all relevant allegations contained in the previous paragraphs and incorporate them by reference herein where applicable.

84. As a direct and proximate result of all the Defendants' breach of duties to the Plaintiffs or the Plaintiffs' decedents as delineated above, the Plaintiffs have sustained the DBCP related injuries, diseases, illnesses and/or conditions set forth above, along with pain and suffering, the undergoing of medical treatment and continued need for medical treatment, medical expenses, past, present, and future disability, impairment of wage earning capacity, lost wages and diminution of quality and enjoyment of life, including the mental anguish, fear, and emotional distress associated with the knowing there is no cure for these diseases or illnesses. The Plaintiffs have also suffered substantial damages in the form of mental anguish, emotional distress, humiliation and social ostracism because they are unable to have a family in accordance with the cultural norms of their society.

85. The Plaintiffs will show that the damages incurred were directly and proximately caused by the reckless and grossly negligent acts and omissions, conscious indifference and other disregard for the health and welfare of the Plaintiffs on the part of the named Defendants, their agents, servants, employees, managers, superintendents, supervisors and officers in that they ignored and concealed evidence available to them which demonstrated that DBCP and DBCP-containing materials were harmful and deadly to persons coming in

contact with such materials. The acts and omissions described above were committed by Defendants maliciously, intentionally, and with flagrant disregard for the rights of the Plaintiffs and others, and with the actual awareness on the part of the Defendants that the acts and omissions would, with reasonable probability, result in great bodily harm to the Plaintiffs. Consequently, users of DBCP-containing products, such as the Plaintiffs, were deprived of the opportunity of free choice as to whether or not to expose themselves to DBCP-containing products manufactured, formulated and used by the named Defendants. The Plaintiffs will show that as a result of the aforesaid conduct, they should be awarded an amount that would punish the Defendants and act as a deterrent to Defendants for the commission of similar wrongs.

86. The Plaintiffs do not assert any claims for exemplary damages because of exposure to DBCP or DBCP-containing products designed, manufactured, formulated, marketed, distributed, or used by Dead Sea Bromine Co., LTD., Bromine Compounds, LTD., Ameribrom, Inc., Israel Chemical Co., LTD., Dead Sea Works, LTD., the State of Israel, or any entity owned by the State of Israel.

87. The Plaintiffs claim damages (including compensatory damages, punitive damages and other damages, if any) that exceed the minimal jurisdictional amount required by this Court.

PRAYER

WHEREFORE, the representative Plaintiffs and the class members demand judgment against the Defendants, and each of them, jointly and severally, for general and special damages and for exemplary damages, for their costs expended, for interest on the judgment from the date rendered until paid, at the legal rate, for pre-judgment interest, and for other such other and further relief both at law and at equity, to which the Plaintiffs may show themselves justly entitled.

The Plaintiffs and the class members pray for relief as follows:

1. That this action be certified as a class action on behalf of the proposed Plaintiff class and that Plaintiffs be designated as representatives of the Class and Plaintiffs' counsel be designated as class counsel;

2. For general damages in a sum in excess of the jurisdictional minimum of this Court;

3. Medical, incidental, hospital, and service expenses according to proof;

4. Loss of earnings and earning capacity;

5. Liquidated damages to compensate for the costs of future medical expenses according to proof;

6. Prejudgment and post judgment interest as provided by law;

7. Compensatory damages in excess of the jurisdictional minimum of the Court, according to proof;

8. Consequential damages in excess of the jurisdictional minimum of the Court, according to proof;

9. Punitive and exemplary damages;

10. Attorneys' fees, expenses, and costs of this action; and

11. Such further relief as this Court deems necessary, just, and proper.

DATED: Charleston, South Carolina, March 2, 1998.

NESS, MOTLEY, LOADHOLT,
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ATTORNEYS FOR
PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERARDO DENNIS PATRICKSON; RODOLFO BERMUDEZ ARIAS; BENIGNO TORRES HERNANDEZ; FERNANDO JIMENEZ ARIAS; MELGAR OLIMPIO MORENO; SANTOS LEANDROS; HERMAN ROMERO AGUILAR; ELIAS ESPINOZA MERELO HOOKER ERA ELASTINO; ALIRIO MANUEL MENDEZ; and CARLOS HUMBERTO RIVERA, Individually and on behalf of others similarly situated,	CIVIL NO. 97-01516 HG (Class Action)
Plaintiffs,	
vs.	
DOLE FOOD COMPANY INC.; DOLE FRESH FRUIT COMPANY; DOLE FRESH FRUIT INTERNATIONAL LIMITED; DOLE FRESH FRUIT INTERNATIONAL, INC.; PINEAPPLE GROWERS ASSOCIATION OF HAWAII; AMVAC CHEMICAL CORPORATION; SHELL	THIRD-PARTY DEFENDANTS DEAD SEA BROMINE CO., LTD. AND BROMINE COMPOUNDS LIMITED'S ANSWER TO DOLE FOOD COMPANY, INC.'S THIRD-PARTY COMPLAINT DATED OCTOBER 31, 1997

OIL COMPANY; DOW)
CHEMICAL COMPANY;)
OCCIDENTAL CHEMICAL)
CORPORATION)
(Individually and as)
successor to Occidental)
Chemical Company and)
Occidental Chemical)
Agricultural Products, Inc.,)
Hooker Chemical and)
Plastics, Occidental)
Chemical Company of Texas)
and Best Fertilizer Company);)
STANDARD FRUIT)
COMPANY; STANDARD)
FRUIT AND STEAMSHIP)
COMPANY; STANDARD)
FRUIT COMPANY DE)
COSTA RICA, STANDARD)
FRUIT COMPANY DE)
HONDURAS, S.A.;)
CHIQUITA BRANDS, INC.;)
CHIQUITA BRANDS)
INTERNATIONAL, INC.)
(Individually and as)
successor in interest to)
United Brands Company,)
Inc.); MARITROP)
TRADING CORPORATION;)
DEL MONTE FRESH)
PRODUCE, N.A.; DEL)
MONTE FRESH)
PRODUCE COMPANY;)
John Does 1-10; Jane Does)
1-10; Doe Partnerships 1-10;)
and Doe Corporations)
1-10,)

Defendants.

DOLE FOOD COMPANY, INC.,

Defendant/Third-Party Plaintiff,

vs.

DEAD SEA BROMINE CO., LTD., and BROMINE COMPOUNDS LIMITED,

Third-Party Defendants.

THIRD-PARTY DEFENDANTS DEAD SEA BROMINE CO., LTD. AND BROMINE COMPOUNDS LIMITED'S ANSWER TO DOLE FOOD COMPANY, INC.'S THIRD-PARTY COMPLAINT DATED OCTOBER 31, 1997

Third-Party Defendants Dead Sea Bromine Co., Ltd. ("Dead Sea") and Bromine Compounds Limited ("Bromine Compounds"), by and through their attorneys, Lyons, Brandt, Cook & Hiramatsu, hereby state their Answer to Dole Food Company, Inc.'s Third-Party Complaint dated October 31, 1997 (the "Third-Party Complaint") as follows:

1. Dead Sea is a foreign corporation incorporated in the State of Israel a majority of whose shares or other ownership interest was owned by a foreign state during all times relevant to this lawsuit. Dead Sea is an agency or instrumentality of the State of Israel under the Foreign Sovereign Immunities Act ("FSIA"). It is specifically denied that Dead Sea "may be

served with citation as provided by the FSIA". Dead Sea is not subject to the process of the federal or state courts of Hawaii.

2. Bromine Compounds is a foreign corporation incorporated in the State of Israel a majority of whose shares or other ownership interest was owned by a foreign state during all times relevant to this lawsuit. Bromine Compounds is an agency or instrumentality of the State of Israel under the FSIA. It is specifically denied that Bromine Compounds "may be served with citation as provided by the FSIA". Bromine Compounds is not subject to the process of the federal or state courts of Hawaii.

3. The allegations contained in Paragraphs 3, 4, 5 and 6 of the Third-Party Complaint are denied.

FIRST DEFENSE

4. The Plaintiffs do not assert any claims, do not seek any damages, and expressly disclaim any recovery for any injuries arising out of exposure to DBCP or products containing DBCP designed, manufactured, marketed, or supplied by Dead Sea, Bromine Compounds, Ameribrom Inc., Israel Chemical Co., Ltd., Dead Sea Works, Ltd., Makhteshim Agan, or the State of Israel. Consequently, the Third-Party Plaintiff lacks standing because it has not alleged and cannot allege any "injury in fact" as a result of any DBCP manufactured, sold, or distributed by Dead Sea or Bromine compounds.

SECOND DEFENSE

5. Dead Sea and Bromine Compounds are not subject to the personal jurisdiction of the federal or state courts of Hawaii. Dead Sea and Bromine Compounds lack the requisite "minimum contacts" with either forum. The assertion of personal jurisdiction over Dead Sea and Bromine Compounds does not comport with traditional notions of fair play and substantial justice.

THIRD DEFENSE

6. Dead Sea and Bromine Compounds assert the defenses of insufficiency of process and insufficiency of service of process.

FOURTH DEFENSE

7. Dead Sea and Bromine Compounds are immune to suit under the doctrine of sovereign immunity.

FIFTH DEFENSE

8. The case should be dismissed on the ground of improper venue.

SIXTH DEFENSE

9. The case should be dismissed on the ground of forum non conveniens.

SEVENTH DEFENSE

10. The Third-Party Complaint fails to state a constitutionally substantial claim.

EIGHT DEFENSE

11. The Third-Party Complaint and each alleged cause of action therein, is prematurely brought and is not yet ripe for adjudication, in that the Third-Party Complaint, and each alleged cause of action therein, fails to allege that the Third-Party plaintiff has sustained or will soon sustain any legally cognizable injury or damage or any injury or damage whatsoever as a result of any DBCP manufactured, sold, or distributed by Dead Sea or Bromine Compounds.

NINTH DEFENSE

12. The Third-Party Complaint fails to state a claim upon which relief can be granted.

TENTH DEFENSE

13. The Plaintiffs do not assert any claims, do not seek any damages, and expressly disclaim any recovery for any injuries arising out of exposure to DBCP or products containing DBCP designed, manufactured, marketed, or supplied by Dead Sea, Bromine Compounds, Ameribrom Inc., Israel Chemical Co., Ltd., Dead Sea Works, Ltd., Makhteshim Agan, or the State of Israel. Accordingly, the Third-Party plaintiff is not entitled to any damages or other relief from either Dead Sea or Bromine Compounds, as no claims for contribution or indemnity can exist.

ELEVENTH DEFENSE

14. The Plaintiffs and Third-Party Plaintiff assumed the risk of any alleged injury or damage.

TWELFTH DEFENSE

15. The Plaintiffs and Third-party Plaintiff failed to mitigate their losses, damages and/or liability.

THIRTEENTH DEFENSE

16. Any injuries, damages, or liability sustained by Plaintiffs or the Third-Party Plaintiff were caused by their own lack of due care and fault, by pre-existing conditions, and/or by the lack of due care or fault of others for whom Dead Sea and Bromine Compounds have no responsibility or control. If the Plaintiffs are found to have suffered injuries or damages alleged, which is specifically denied, then said injuries and damages were caused by the fault, negligence, last clear chance, assumption of risk and/or inattention of the Plaintiffs and/or negligence and/or strict liability of others for whom or for which Dead Sea and Bromine Compounds may not be held responsible.

FOURTEENTH DEFENSE

17. Any injuries, damages or liability sustained by Plaintiffs or the Third-Party Plaintiff were caused by intervening or superseding events, factors, occurrences, or conditions that were not caused by Dead Sea or Bromine Compounds and for which Dead Sea and Bromine Compounds are not liable.

FIFTEENTH DEFENSE

18. The Plaintiffs and the Third-Party Plaintiff were contributorily or comparatively negligent.

SIXTEENTH DEFENSE

19. Any claim against Dead Sea or Bromine Compounds with respect to the recovery of exemplary or punitive damages would violate the due process, takings, excessive fines, and equal protection clauses of the United States Constitution and the Constitution of the State of Hawaii to the extent that such damages: (1) are not required to be established by clear and convincing evidence and/or some other appropriate heightened standard of proof; (2) are awarded by a jury which is not provided with adequate standards for their determination; (3) are awarded by a jury which is not prohibited from determining such damages on the basis of discriminatory characteristics; (4) are awarded on the basis of actions or inactions of persons other than Dead Sea or Bromine Compounds; (5) are awarded as a result of exposure to DBCP that neither Dead Sea nor Bromine Compounds manufactured, sold or distributed; (6) are awarded without a bifurcated trial proceeding where evidence relating to punitive damages is not admitted until compensatory liability has been established; and (7) may subject defendants to multiple penal sanctions for the same alleged conduct or "offense".

SEVENTEENTH DEFENSE

20. Any claim against Dead Sea or Bromine Compounds for damages or in contribution or indemnity arising from exposure to DBCP that neither Dead Sea nor Bromine Compounds manufactured, sold or distributed is unconstitutional under the due process, equal protection, excessive fines, and takings clauses of the constitutions of the United States and State of Hawaii.

EIGHTEENTH DEFENSE

21. Plaintiffs and Third-Party Plaintiff are not entitled to the relief requested under any applicable foreign law.

NINETEENTH DEFENSE

22. The Plaintiffs' and Third-Party Plaintiff's claims are barred, in whole or in part, as a result of prior releases, settlements, and/or agreements, including certain Agreements executed on April 11, 1994 and September 15, 1995.

TWENTIETH DEFENSE

23. The Plaintiffs' and Third-Party Plaintiff's claims are barred, in whole or in part, under the doctrines of res judicata and issue preclusion.

TWENTY-FIRST DEFENSE

24. The Plaintiffs' and Third-Party Plaintiff's claims are preempted by the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §136, et seq.

TWENTY-SECOND DEFENSE

25. The Third-Party Complaint is barred because the actions or omissions of Dead Sea and Bromine Compounds, if any, were de minimis and did not proximately cause any of Plaintiffs' alleged damages, injuries, or expenses. If Dead Sea and/or Bromine compounds are established to have taken any actions or omissions pertinent to the allegations of the

Plaintiffs' Complaint, the Third-Party Complaint is nevertheless barred by the doctrine of de minimis non curat lex.

TWENTY-THIRD DEFENSE

26. The Plaintiffs' Complaint and Third-Party Complaint are barred by prescription and/or the applicable statutes of limitations or statues of repose and the doctrines of laches, waiver and estoppel.

TWENTY-FOURTH DEFENSE

27. Any injuries resulting from the use of the subject product or products, which injuries are hereby expressly denied, were not foreseeable to Dead Sea and/or Bromine Compounds given the state of knowledge and state of the art at the time of their alleged actions or omissions.

TWENTY-FIFTH DEFENSE

28. The Third-Party Complaint, and each alleged cause of action therein, is barred on the grounds that products or materials manufactured, distributed, or sold by Dead Sea or Bromine Compounds, if any, were not a substantial factor in bringing about the injuries and damages complained of by Plaintiffs. Dead Sea and Bromine Compounds specifically deny that the Plaintiffs sustained any injury as a result of contact with or use of any product manufactured, formulated, distributed, or sold by Dead Sea or Bromine Compounds.

TWENTY-SIXTH DEFENSE

29. If Plaintiffs alleged suffered injuries attributable to the use of any product or material manufactured, packaged, labeled or sold by Dead Sea or Bromine Compounds, such injuries were solely caused by and attributable to the unreasonable, unforeseeable and inappropriate purpose and improper use or misuse or disposal that was made of said product or material.

TWENTY-SEVENTH DEFENSE

30. The benefits of the products, chemicals and compounds referred to in the Complaint outweighed the risks of danger, if any, inherent in such products, chemicals and compounds.

TWENTY-EIGHTH DEFENSE

31. Neither Plaintiffs nor Third-Party Plaintiff reasonably relied on any representation, disclaimer, warning, or other act or omission of Dead Sea or Bromine Compounds.

TWENTY-NINTH DEFENSE

32. All conduct and activities of Dead Sea and Bromine Compounds relevant hereto conformed to statutes, government regulations and industry standards based upon the state of knowledge existing at all relevant times.

THIRTIETH DEFENSE

33. The production, sale, packaging, and labeling of the products or materials referred to in the Complaint, if any, were licensed and/or permitted by any government having jurisdiction over such matters.

THIRTY-FIRST DEFENSE

34. Others modified, altered, changed, or added additional substances to the products or materials, if any, manufactured, sold, or distributed by Dead Sea or Bromine Compounds, so that such changes in any said products or materials proximately caused Plaintiffs' injuries, loss and damages, if any.

THIRTY-SECOND DEFENSE

35. Products or materials manufactured, sold, or distributed by Dead Sea or Bromine Compounds pertaining hereto, if any, were not dangerous or defective, and the alleged

hazards or dangers, if any, were created by the conduct of others.

THIRTY-THIRD DEFENSE

36. The products of Dead Sea and Bromine Compounds, if any, were sold to sophisticated intermediaries and/or users and/or purchasers with respect to the products who had any then-available knowledge of any risks involved in the use of said products.

THIRTY-FOURTH DEFENSE

37. The Dead Sea and Bromine Compounds' products and materials at issue here at all times were produced and marketed in conformity with the existing state-of-the-art.

THIRTY-FIFTH DEFENSE

38. Products or materials supplied by Dead Sea or Bromine Compounds, if any, to others, were not themselves hazardous, dangerous or defective. It a pesticide formulated using such products or materials, if any, is determined to have been hazardous, dangerous or defective, the alleged hazards, dangers, or defects of such pesticide, it any, were not caused by any act, omission, product, or material of Dead Sea or Bromine Compounds but were, rather, caused by the acts or omissions (such as improper marketing of the pesticides, improper instructions or training as to use of the pesticide improper failure to provide warnings as to the use, misuse, or disposal of the pesticide, or improper use, misuse, or disposal of the pesticide) of other sophisticated corporations or other persons that neither Dead Sea nor Bromine Compounds controlled.

THIRTY-SIXTH DEFENSE

39. To the extent products or materials, if any, supplied to others by Dead Sea or Bromine Compounds were bulk chemicals that could not be used by the consumer without substantial modification, alteration, packaging, distribution,

marketing, and instructions and warnings as to use or misuse, Dead Sea and/or Bromine Compounds were mere bulk suppliers of raw materials to other sophisticated corporations and did not proximately or legally cause any damages or expenses to Plaintiffs or Third-Party Plaintiff.

THIRTY-SEVENTH DEFENSE

40. The claims are barred by the doctrines of unclean hands and in pari delicto potior est conditio possidentis due to the acts or omissions of the Third-Party Plaintiff and/or others whose acts or omissions can be imputed to the Third-Party Plaintiff.

THIRTY-EIGHTH DEFENSE

41. Any recovery against Dead Sea or Bromine Compounds is limited to the cognizable damages that are established to have been sustained as a proximate result of any tortious conduct or omissions of them. Neither Dead Sea or Bromine Compounds is liable for any damages sustained as a result of the tortious conduct or omissions of any other defendant or person.

THIRTY-NINTH DEFENSE

42. The cognizable damages, if any, that the Plaintiffs and/or Third-Party Plaintiff have sustained are divisible or reasonably capable of apportionment and Dead Sea and Bromine Compounds cannot be held liable for any harm that is not attributable to their conduct or omissions, if any, that are established to have been tortious.

FORTIETH DEFENSE

43. Under the Foreign Sovereign Immunities Act, neither the Plaintiffs nor any other party is entitled to a jury trial as to any claim against Dead Sea or Bromine Compounds, which object to a trial by jury of any claim brought against them.

FORTY-FIRST DEFENSE

44. The Plaintiffs' and Third-Party Plaintiff's claims are barred due to failure to join one or more indispensable parties.

FORTY-SECOND DEFENSE

45. The Plaintiffs' and Third-Party Plaintiff's claims are barred by the doctrine of lis pendens, other prior pending suits in other jurisdictions.

FORTY-THIRD DEFENSE

46. Dead Sea and Bromine Compounds aver that alleged injuries of which the Plaintiffs complain were not caused or brought about by any product manufactured, formulated, distributed by Dead Sea or Bromine Compounds, and such alleged injuries were due to causes in no manner connected with or related to Dead Sea, Bromine Compounds, or any of their products.

FORTY-FOURTH DEFENSE

47. If the Plaintiffs are found to have suffered injuries and damages consequent upon the fault of any party for whom Dead Sea or Bromine Compounds may be held responsible or accountable, all of which is specifically denied, then said injuries or damages were caused and/or contributed to and/or aggravated by the fault, negligence, last clear chance, assumption of risk, comparative fault and/or inattention of the Plaintiffs and/or the negligence and/or strict liability of others for whom or for which Dead Sea and Bromine Compounds may not be held responsible and/or an act of God or a preexisting condition, and Dead Sea and Bromine Compounds are entitled to have any award or recovery due to the Plaintiffs or Third-Party Plaintiff barred, mitigated or reduced accordingly.

FORTY-FIFTH DEFENSE

48. Any alleged injuries sustained by Plaintiffs as a result of exposure to DBCP, which allegations are specifically denied, were the result of the negligent failure of the Plaintiffs, or others for whom Dead Sea and Bromine Compounds may not be held responsible, to guard against unsafe contact, if any, with products containing DBCP. Such conduct constitutes the proximate cause and/or sole producing cause of any alleged injuries sustained by Plaintiffs.

FORTY-SIXTH DEFENSE

49. The negligent failure of the Plaintiffs, and/or others for whom Dead Sea and Bromine Compounds may not be held responsible, to guard against unsafe contact, if any, with products referred to in the Plaintiffs' Complaint constitutes a new and independent cause of any alleged injuries sustained by Plaintiffs. Dead Sea and Bromine Compounds specifically plead superseding and/or intervening cause as a defense.

FORTY-SEVENTH DEFENSE

50. Dead Sea and Bromine Compounds specifically deny that they breached any warranty, expressed or implied to the Plaintiffs or to anyone else. Furthermore, Dead Sea and Bromine Compounds specifically deny that they manufactured any product to which Plaintiffs were exposed which was in any manner defective or unreasonably dangerous. Furthermore, Dead Sea and Bromine Compounds deny that they violated any alleged duty to warn the Plaintiffs or anyone else. Dead Sea and Bromine Compounds further deny that they violated any alleged duty of care or committed negligence or any other tort.

PRAYER FOR RELIEF

WHEREFORE, Dead Sea and Bromine Compounds pray for judgment as follows:

1. That the Third-Party Plaintiff take nothing by reason of the Third-Party Complaint or any claims stated therein;

2. That the Third-Party Complaint and each cause of action contained therein be dismissed with prejudice;

3. That Dead Sea and Bromine Compounds recover their costs, disbursements, expenses, and attorneys' fees herein;

4. That if Dead Sea and Bromine Compounds are found liable, the degree of responsibility and liability for the resulting damages be determined and they be liable only for that portion of the total damages in proportion to their responsibility for the same; and

5. That the Court grant such other and further relief as it may deem just and proper.

DATE: Honolulu, Hawaii, November 20, 1997.

/s/
GEORGE W. BRANDT
Attorney for Third-Party Defendants
DEAD SEA BROMINE CO., LTD. and
BROMINE COMPOUNDS LIMITED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERRARDO DENNIS PATRICKSON, et al. Plaintiffs, vs. DOLE FOOD COMPANY, INC., et al. Defendants, DOLE FOOD COMPANY, INC., Defendant/Third-Party Plaintiff, vs. DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED, Third-Party Defendants.	CIVIL NO. 97-01516 HG

DECLARATION OF NOAH EHRLICH

NOAH EHRLICH affirms and declares under penalty of perjury:

1. I am the Vice President of Industrial Chemicals of Dead Sea Bromine Company Ltd. ("Dead Sea Bromine"), a company organized under the laws of the State of Israel with

principal offices in Beer Sheva, Israel. I hold the same position with Bromine Compounds Ltd. ("BCL"), a wholly owned subsidiary of Dead Sea Bromine, also organized under the laws of Israel and headquartered in Beer Sheva. (Dead Sea Bromine and BCL are sometimes collectively referred to as the "Companies" in this declaration.) I submit this declaration in opposition to the Plaintiff's Motion to Remand.

2. I have been employed in my current position since January 1, 1995. From January 1, 1993 through December 31, 1994, I was Head of the Marketing Division, and from August 1985 through December 31, 1991, I was Head of the Finance Division, a position similar to that of Chief Financial Officer. In all, I have been employed by the Dead Sea Bromine Group of companies for some twenty years, including five years with Ameribrom, Inc., a wholly-owned United States subsidiary of Dead Sea Bromine, from March 1980 to July 1985. During my tenure with the Dead Sea Bromine Group, I have become familiar with and knowledgeable concerning the Companies' respective business operations and their corporate structure.

3. The information set forth below is based, in part, on personal knowledge. It is also based on general knowledge I have acquired during the course of my employment, including but not limited to my review of the Companies' records and documents including specifically the documents and records identified below. Any information of which I do not have personal knowledge I believe to be true and correct based on my experience and familiarity with the Companies.

OVERVIEW

4. As described more fully below, and in the accompanying declarations from the corporate secretaries of the Companies and their successive parent corporations, the State of Israel did possess a majority ownership interest in the Companies during the time period from 1967 to February 1995, the precise structure of which varied from time to time over the years. See ¶¶ 9-16. Similarly, the State had a

significant interest in and exercised control and supervision of the Companies' affairs, in numerous matters, large and small, and in a wide variety of ways. See ¶¶ 20-25.

5. Before elaborating on the State's ownership and oversight of the Companies during this period, I will briefly describe the nature of the Companies' business and the context in which they have operated throughout their history.

6. Dead Sea Bromine is and always has been engaged primarily in the business of extracting bromine—a chemical element—from the brines of the Dead Sea. The Dead Sea, which is the lowest spot on earth, is an inland lake, rich in a number of minerals, such as bromine, potassium and magnesium, the processing of which is facilitated by stark climatic conditions—heat and dryness—which enable solar evaporation to function as the initial stage of the chemical processing. The Dead Sea is also one of the most important (and relatively few) natural resources in Israel. Indeed, the enterprise of exploiting the mineral wealth of the Dead Sea has been carried on pursuant to an exclusive license and sublicensee, (called the Dead Sea Concession) from the State. See ¶ 21.

7. Since its incorporation in 1955, Dead Sea Bromine has developed the business of producing, distributing and selling relatively large quantities of elemental bromine to chemical plants and companies located in Israel and other countries, where it is further processed into a variety of bromine compounds for diverse uses. BCL, which was created in 1961, is engaged primarily in the business of taking the elemental bromine extracted by Dead Sea Bromine and combining it with other chemicals to produce a number of chemical compounds having diverse industrial, commercial, and agricultural uses. Approximately 90% of these chemical compounds are exported.

8. Throughout the period 1967-1995, the Companies were operated under commercial principles, and, like all

commercial enterprises, attempted to earn a profit. However, the Companies differed in certain respects from privately owned commercial businesses. They were created, owned and controlled by the State. They operated pursuant to an exclusive license from the State to exploit, develop and market the State's natural resources. They were subject to a significant degree of State oversight, supervision and control. On a limited number of occasions the State required the Companies to deviate from commercial principles in conducting their affairs, to support or pursue some other policies or objectives that the State deemed more important. Even today, following a move toward privatization that in February 1995 reduced the State's ownership interest to slightly less than 50%, the State of Israel continues to retain certain important measures of control over the Companies that evidence: the Companies' key roles in the exploitation, development and sale of the State's natural resources; the Companies' integral position in the Israeli industrial and economic base; and the State's central interest in their management and welfare.

THE OWNERSHIP OF BCL AND DEAD SEA BROMINE

9. Attached to this Declaration as Exhibits "A1-A3" are true and correct copies of declarations from officers of Dead Sea Bromine, BCL and their parent companies. These declarations establish the ownership of Dead Sea Bromine and BCL during the period 1967-1997. The facts related in these declarations are true and correct to the best of my knowledge. The information contained in these declarations is summarized below.

10. From in or about 1968-1970, the State of Israel owned approximately 99% of the stock of Dead Sea Works ("DSW") and one share of Dead Sea Bromine. DSW owned 99.9% of the shares of Dead Sea Bromine. Dead Sea Bromine, in turn, owned 50% of the ordinary shares of BCL. In addition, Dead

Sea Bromine held a management share in BCL which entitled Dead Sea Bromine to appoint an additional director. Accordingly, Dead Sea Bromine held a majority interest and a controlling position in BCL during this period.

11. From in or about 1970 to 1975, the State of Israel owned approximately 99% of the stock of DSW and one share of Dead Sea Bromine. DSW in turn owned some 99.9% of Dead Sea Bromine, and starting in late 1969 or early 1970, DSW owned 25% of BCL's ordinary shares. Dead Sea Bromine owned 50% of the ordinary shares of BCL (bringing the State's overall ownership interest in BCL to 75%). The remaining 25% of the ordinary shares of BCL was owned by an unrelated corporate entity.

12. In or about 1975, the State restructured its ownership of the Companies and conveyed all the shares of DSW to Israel Chemicals Ltd. ("ICL"), an Israeli corporation owned entirely by the State, leaving its ultimate ownership interest in DSW and the Companies essentially the same.

13. In or about 1981, DSW acquired the remaining 25% interest in BCL that had been owned by the unrelated corporation, such that BCL was owned entirely by DSW and its wholly-owned subsidiary, Dead Sea Bromine.

14. In or about 1984, all of DSW's shares of BCL were conveyed to Dead Sea Bromine, making BCL a wholly owned subsidiary of Dead Sea Bromine.

15. The ownership configuration described above remained in place until 1992. Charts depicting the State of Israel's majority ownership and control of the Companies during the period 1968-1985 are attached in the appendix as Exhibits "B1-B4."

16. In 1992, the State of Israel began to privatize ICL by decreasing over time the number of shares of ICL owned by the State. In February 1992, some 19.97% of ICL stock was offered for public sale on the Tel Aviv Stock Exchange and to

employees of ICL. Again, in February 1995, the State sold an additional 24.9% of its ICL stock which, taken together with certain minor transactions in the intervening years, reduced its share ownership in ICL to approximately 48.5%. As a consequence, neither ICL nor the Companies are considered any longer to be a government company or government subsidiary company under Israeli law. (The structure of the ICL group of companies was also reorganized in 1995 by the conveyance of DSW's shares of Dead Sea Bromine to ICL. Today, both DSW and Dead Sea Bromine are direct subsidiaries of ICL.)

17. While the State of Israel's ownership interest in ICL was reduced, the State's ability to control fundamentally important corporate decisions of the Companies was preserved. The Companies' respective Articles of Association were amended to expressly recognize and recite the State of Israel's historical and current vital interests in the Companies, and to create a Special State Share, giving the State of Israel certain extraordinary powers to protect its vital interests in and over the functions performed by the Companies.

18. The State of Israel's vital national interests in the Companies are expressly recited in their respective Articles of Association, relevant excerpts of which are attached hereto as Exhibits "C" and "D." These vital interests are as follows:

(a) Preservation of the character of Dead Sea [and BCL] as an Israeli company whose center of business and management is in Israel.

(b) Supervision of the control of quarries and natural resources for their efficient development and exploitation, including maximum application in Israel of the results of the investments, research and development.

(c) Prevention of the achievement of a position of influence in Dead Sea [and BCL] by hostile elements

or elements which may prejudice the State's foreign and defense interests.

(d) Prevention of the achievement of a position of influence in Dead Sea [and BCL] or the management of Dead Sea [and BCL] where such acquisition or management could create a material conflict of interest which may prejudice one of the vital interests particularized in sub-paragraphs (a), (b) and (c) above.

Articles of Association ("AA"), Appendix, Ex. C, ¶ 13B(8); Appendix, Ex. D, ¶ 13B(8) (emphasis added).

19. The Articles of Association go on to describe various extraordinary powers conferred upon the State as the holder of the Special State share. For example, resolutions providing for the alteration or reorganization of the structure of the Companies, voluntary liquidation, and merger are invalid without the consent of the State of Israel. AA, Ex. C and Ex. D, ¶ 13B(2). Similarly, any acquisition or holding of 14% or more of the Companies' issued share capital and any acquisition or holding of 25% or more of such issued share capital, including the augmentation of an existing holding to 25%, are invalid without the State of Israel's consent. AA, Ex. C and Ex. D, ¶ 13B(3)(a) and ¶ 13B(3)(b). Additionally, the consent of the State of Israel is required for each portion of a share holding in the share capital which confers upon its holder the right, or actual or potential ability to appoint directly or indirectly 50% or more of the directors of the respective Companies. AA, Ex. C and Ex. D, ¶ 13B(3)(c). Finally, the substantial assets of the Companies cannot be sold without State approval. AA, Ex. C and Ex. D, ¶ 13B(l)(b).

THE UNIQUE GOVERNMENTAL INTEREST IN DEAD SEA BROMINE AND BCL

20. In addition to the majority ownership of the Companies by the State of Israel during the relevant period, Dead Sea Bromine and BCL performed or discharged functions vital to

the State of Israel and were subject to control, regulation and supervision by the State. As discussed below, the Israeli government monitored, supervised and regulated the Companies on matters large and small through or by virtue of the Dead Sea Concession and Sub-concession, the Government Companies Law, and the Government Companies Authority.

a. The Dead Sea Concession and Sub-concession

21. In 1961, the Knesset (the legislative body of the State of Israel) enacted the Dead Sea Concession, which granted an exclusive license to DSW to obtain, render marketable, sell and dispose of the mineral salts, minerals and chemicals in and beneath the Dead Sea. With the approval of the Knesset, DSW in turn granted a Sub-concession (the "Dead Sea Sub-concession") to Dead Sea Bromine, conferring exclusive rights to obtain, render marketable, sell and dispose of bromine and bromine compounds from the mineral salts, minerals and chemicals in and beneath the Dead Sea. Translations of the Dead Sea Concession and Sub-concession, which I believe to be true and correct, are annexed in the Appendix as Exhibits "E" and "F."

b. The Government Companies Authority and Government Companies Law

22. Until 1995, Dead Sea Bromine and BCL were also subject to the regulation and oversight of the Government Companies Authority (the "GCA"), an administrative office established by the Ministry of Finance. In 1975, the powers and responsibilities of the GCA were set forth in the Government Companies Law ("GCL"), a copy of which is included in the Appendix as Exhibit "G." The GCL provides for the regulation and oversight by the government, acting through the GCA, certain ministers of the Israeli Government, and other state officials and committees, to monitor and ensure government input and approval of the affairs of corporations that are majority owned by the State.

23. During the period 1967 to 1995, the State of Israel has circumscribed, overseen, regulated and supervised the activities, operations and management of the Companies in a wide variety of ways. Included in the Appendix are English translations of a number of documents and relevant excerpts of documents that have been located in the Companies' files that evidence the numerous and far-ranging interactions between the Companies and the Israeli government. These include Circulars and Directives published and distributed by the GCA describing various policies, requirements, recommendations or directives to be followed by government-owned corporations, correspondence between the GCA and the Companies concerning various matters, and minutes of the Companies' shareholders and Board of Directors meetings. For the most part, these are self-explanatory.

24. As evidenced by the accompanying documents, the State of Israel either through Government Ministers, the Appointments Review Committee established by the GCL, the Government Companies Authority and/or the Attorney General have, among other things:

a. regularly appointed employees of the Ministry of Finance and the Ministry of Industry and Trade to the Companies' respective Boards of Directors (Appendix, Exhibits "H1" - "H22");

b. issued directives as to the rules and procedures i) to be followed by the Companies' respective Boards of Directors, ii) prohibiting the appointment of alternate or substitute directors, iii) terminating the tenure of directors for excessive absences; and Improper Venue and Insufficiency of Service of Process) specifying the content of the Board minutes (Appendix, Exhibits "I1" - "I20");

c. approved all of the Companies' directors (Appendix, Exhibits "J1" - "J8");

d. appointed employees of the Authority to act as observers at the Companies' Board of Directors meetings and to attend subcommittee meeting of the Boards such as the Balance Sheet Sub-Committee (Appendix, Exhibits "K1" - "Kl0");

e. monitored the attendance and the activities of members of the Companies' Boards of Directors (Appendix, Exhibits "L1" - "L13");

f. approved the Companies' managing directors (the equivalent of the president or chief executive officer), as well as their compensation (Appendix, Exhibits "Ml" - "M3");

g. established procedures for the selection of legal advisors including the requirement that the GCA approve the selection (Appendix, Exhibits "N1" - "N32");

h. established procedures for the selection of auditors, including the requirement that the GCA approve the selection (Appendix, Exhibits "O1" - "O9");

i. issued directives as to dispute resolution practices to be followed between government bodies, including the Companies as government companies (Appendix, Exhibits "P1" - "P11");

j. refused to approve or extend the appointment of directors (Appendix, Exhibit "Q");

k. placed restrictions on the circumstances and the amounts of charitable contributions which could be made by the Companies (Appendix, Exhibits "R1" - "R22");

l. issued directives that the Companies only contract with entities having a value added tax certificate in compliance with Israeli law (Appendix, Exhibits "S1" - "S6");

m. on multiple occasions required and/or strongly encouraged the Companies to prefer the purchases of Israeli products even if the cost was higher than the cost of non-Israeli goods (Appendix, Exhibits "T1"-"T20");

n. required that the Companies freeze salaries and wages (Appendix, Exhibits "Ul" - "U3");

o. advised the Companies to insert clauses in their contracts with subcontractors (Appendix, Exhibits "V1" - "V3");

p. restricted foreign travel by the Companies' officers and directors (Appendix, Exhibits "W1" - "W6");

q. approved or set the compensation to be paid to the Companies' executives (Appendix, Exhibit "Y") including the retirement benefits of the Companies' executives (Appendix, Exhibit "Z");

r. established policies as to the utilization and standardization of company cars (Appendix, Exhibits "AA1" - "AA8");

s. established or set labor policies and approved the Companies' labor agreements (Appendix, Exhibits "BB1" - "BB16");

t. issued directives regarding certain hiring and promotion policies to be followed by the Companies (Appendix, Exhibits "CC1" - "CC8");

u. encouraged the Companies to become "models of efficiency," and to curb or decrease their expenses (Appendix, Exhibits "DDl" - "DD13");

v. approved the investments made by the Companies (Appendix, Exhibits "EEl" - "EEl0");

w. approved changes to the capital structure of the Companies as well as the issuance, sale and transfer of shares (Appendix, Exhibits "FF1" - "FF34");

x. approved bonuses to be paid to the Companies' employees (Appendix, Exhibits "GG1" - "GGl0");

y. approved the establishment of a subsidiary (Appendix, Exhibit "HH");

z. required that changes be made to the Companies' Articles of Association (Appendix, Exhibits "II1" - "II14");

aa. restricted ICL from changing the Companies' objects, transferring their shares, or changing their registered share capital or selling their assets without obtaining Government approval (Appendix, Exhibit "JJ");

bb. reviewed, approved and made recommendations with respect to the Companies' budgets, business plans and operations (Appendix, Exhibits "KKl" - "KK15").

25. The State of Israel possessed other mechanisms to regulate and control the Companies during some or all of this time period. Reports had to be transmitted on a regular basis to the Authority. Appendix, Exhibits "I-4" - "I-13;" and Ex. G §§ 25 and 34; Ex. E ¶ 16(b); and Ex. F ¶ 18(b). Additionally, the government had the right, under the GCL and the Dead Sea Concession and Sub-Concession, to inspect, on demand, the Companies' books, records, documents, and to obtain information from the Companies' employees as to any and all aspects of the Companies' business activities and operations. Exhibits "G" §§ 20, 45 and 55; "E" ¶ 16(a) and "F" ¶ 18(a). Moreover, the Companies were subject to audits by the State.

CONCLUSION

26. As is evident from the above examples, the State of Israel oversaw, regulated, supervised, and monitored the

Companies' business affairs and operations covering a wide range of matters, large and small. Through the GCL, the GCA, the Dead Sea Concession and Sub-Concession, the Articles of Association, and its majority ownership and control of the Companies, the State of Israel established the Companies' objectives of exploiting, developing and marketing the State's natural resources, and actively monitored, regulated and supervised the Companies' management, affairs and activities.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Beer Sheva, Israel
on December 18, 1997.

/s/
NOAH EHRLICH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERRARDO DENNIS PATRICKSON, et al. Plaintiffs, vs. DOLE FOOD COMPANY, INC., et al. Defendants,	)	CIVIL NO. 97-01516 HG
DOLE FOOD COMPANY, INC., Defendant/Third-Party Plaintiff, vs. DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED, Third-Party Defendants.	)	

DECLARATION OF DANIEL C. SUGARMAN

DANIEL C. SUGARMAN affirms and declares under penalty of perjury:

1. I am the secretary of Dead Sea Works Ltd. ("Dead Sea Works"), a company organized under the laws of the State of Israel, with principal offices in Beer Sheva, Israel.

2. As the secretary of Dead Sea Works, I am the responsible for the custody of corporate records and documents pertaining to the share ownership of the company. The information set forth below is a true and accurate summary of the information in Dead Sea Works' books and records, which I have caused to be examined in connection with the preparation of this declaration.

3. During the period of time from 1968 to 1975, the State of Israel owned approximately 99% of the shares of Dead Sea Works.

4. In 1975, the State of Israel conveyed all of its shares of Dead Sea Works to Israel Chemicals Ltd. ("ICL").

5. From 1975 to 1977, ICL owned approximately 98% of the shares of Dead Sea Works.

6. ICL reduced its shareholdings in Dead Sea Works to approximately 91% in 1978, and to approximately 88% in 1983.

7. From 1983 to the present time, ICL owned and continues to own approximately 88% of the shares of Dead Sea Works.

8. In 1992, Dead Sea Works issued a special state share to the State of Israel. Since its issuance, the special state share has been and continues to be held by the State of Israel.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Beer Sheva, Israel
on December 15, 1997.

/s/
Daniel C. Sugarman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERRARDO DENNIS PATRICKSON, et al. Plaintiffs, vs. DOLE FOOD COMPANY, INC., et al. Defendants,	)	CIVIL NO. 97-01516 HG
DOLE FOOD COMPANY, INC., Defendant/Third-Party Plaintiff, vs. DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED, Third-Party Defendants.	)	

DECLARATION OF Noam Heth-Makov

Noam Heth-Makov affirms and declares under penalty of perjury:

1. I am the secretary of Israel Chemicals Ltd. ("ICL"), a company organized under the laws of the State of Israel, with principal offices in Beer Sheva, Israel.

2. As the secretary of ICL, I am the custodian of records and documents pertaining to the share ownership of the company. The information set forth below is a true and accurate summary of the information in ICL's books and records, which I have caused to be examined in connection with the preparation of this declaration.

3. During the period of time from 1972 to 1992, all of the shares of ICL were owned by the State of Israel.

4. In or about February 1992, the State of Israel sold some 19.97% of the shares of ICL to the public and to company employees, reducing the State's share ownership of the company to approximately 80.03%. In 1992, ICL also issued a special state share to the State of Israel. Since its issuance, the special state share has been and continues to be held by the State of Israel.

5. In or about February 1995, the State sold an additional 24.9% of ICL stock. The latter transaction, combined with certain minor transactions in the intervening time period, reduced the State's share ownership of ICL to approximately 48.52%.

6. In or about March 1997, the State sold an additional 17% of ICL stock which reduced the State's share ownership of ICL to approximately 31.52%, which it remains to the present day.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Beer Sheva, Israel
on December 15, 1997.

/s/
Noam Heth-Makov

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERRARDO DENNIS PATRICKSON, et al. Plaintiffs, vs. DOLE FOOD COMPANY, INC., et al. Defendants,	CIVIL NO. 97-01516 HG
DOLE FOOD COMPANY, INC., Defendant/Third-Party Plaintiff, vs. DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED, Third-Party Defendants.	

DECLARATION OF BAT-SHEVA GOLAN

BAT-SHEVA GOLAN affirms and declares under penalty of perjury:

1. I am the secretary of Dead Sea Bromine Company Ltd. ("DSB") and Bromine Compounds Limited ("BCL"), both of which are companies organized under the laws of the State of Israel with principal offices in Beer Sheva, Israel.

2. As the secretary of DSB and BCL, I am the custodian of their respective corporate records and documents pertaining to the share ownership of the companies. The information set forth below is a true and accurate summary of information in the companies' books and records, which I have caused to be examined in connection with the preparation of this declaration.

A. Ownership of Dead Sea Bromine Company Ltd.

3. During the period of time from 1965 to 1986, all of the shares of DSB were owned by Dead Sea Works, Ltd. ("Dead Sea Works"), except for one share, which was owned by the State of Israel.

4. In 1986, one share of DSB was transferred to each of Israel Chemicals, Ltd. ("ICL") and four ICL subsidiaries to be held in trust for Dead Sea Works. Dead Sea Works continued to own the remaining 99.99% of the shares of DSB except for the single share owned by the State of Israel.

5. In or about February 1992, the State of Israel converted its ordinary share into a special state share, which it holds to the present day.

6. In February 1995, Dead Sea Works distributed its shares of DSB to its shareholders, after which ICL held approximately 89% of the shares of DSB, and the remaining approximately 11% were held by the public.

B. Ownership of Bromine Compounds Limited

7. During the period of time from 1965 to 1969, DSB owned 50% of the ordinary shares of BCL and one Management Share. The Management Share carried with it the right to appoint one direct to the Board of Directors. Two

companies unrelated to the Israeli Government each owned 25% of the ordinary shares of BCL during this time period.

8. In late 1969 or early 1970, Dead Sea Works acquired 25% of the ordinary shares of BCL from one of the unrelated companies. At this time and continuing to 1981, DSB owned 50% of the ordinary shares of BCL plus a management share, Dead Sea Works owed 25% and Makhteshim, an unrelated entity, owned the remaining 25% of the ordinary shares of BCL.

9. On or about October 1970, the rights attached to the management share were amended to remove the special right to appoint a director.

10. In 1981, Makhteshim transferred all of its shares of BCL to Dead Sea Works thereby giving Dead Sea Works 50% ownership of the ordinary shares in BCL, with DSB owning the remaining 50% of the ordinary shares.

11. In 1984, Dead Sea Works transferred all of its shares in BCL to DSB and DSB transferred one ordinary share to ICL.

12. In or about February 1992, a special state share was issued by BCL to the State of Israel. Since its issuance, the special state share has been and continues to be held by the State of Israel.

13. In summary, the share ownership of BCL between the years 1965 to present was as follows:

1965 - 1969	50% ordinary shares - DSB; 25% ordinary shares - unrelated company; 25% ordinary shares - unrelated company; 1 management share - DSB.
1970 - 1981	50% ordinary shares - DSB; 25% ordinary shares - Dead Sea Works; 25% ordinary shares - Makhteshim; 1 management share - DSB.

1981 - 1984	50% ordinary shares - DSB; 50% ordinary shares - Dead Sea Works; 1 management share - DSB.
1984 - 1992	99.9% ordinary shares - DSB; 1 ordinary share - ICL; 1 management share - DSB.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at Beer Sheva, Israel
on December 15, 1997.

/s/
Bat-Sheva Golan

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERRARDO DENNIS PATRICKSON, et al. Plaintiffs, vs. DOLE FOOD COMPANY, INC., et al. Defendants.	CIVIL NO. 97-01516 HG
DOLE FOOD COMPANY, INC., Defendant/Third-Party Plaintiff, vs. DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED, Third-Party Defendants.	

DECLARATION OF PETER R. PADEN

Peter R. Paden, an attorney licensed to practice law in the State of New York, affirms and declares under penalty of perjury:

1. I am a member of Robinson Silverman Pearce Aronsohn & Berman LLP. I am admitted to practice in the

U.S. Court of Appeals for the Second Circuit (1979); U.S. Court of Appeals for the Fifth Circuit (1996); U.S. District Court for the Southern District of New York (1977); U.S. District Court for the Eastern District of New York (1977); and U.S. District Court for the Northern District of New York (1984). I have been admitted pro hac vice to practice in this Court for purposes of this action.

2. Together with Thomas J. Brandt, Esq. of Sheinfeld Maley & Kay, P.C., I represent Dead Sea Bromine Co., Ltd. ("Dead Sea") and Bromine Compounds Limited ("BCL") in the consolidated cases styled: Franklin Rodriguez Delgado, et al. v. Shell Oil Co., et al., Civil Action No. H-94-1337, in the U.S. District Court for the Southern District of Texas, Houston Division ("Delgado"); Ramon Rodriguez v. Shell Oil Co., et al., Civil Action No. H-96-1790, in the U.S. District Court for the Southern District of Texas, Houston Division ("Rodriguez"); Lucas Pastor Canales Martinez, et al. v. The Dow Chemical Company, et al., Consolidated Civil Action No. 95-3212, formerly pending in the U.S. District Court for the Eastern District of Louisiana ("Martinez") and certain other related DBCP litigations. The statements set forth in paragraphs 1, 2, 3, 6 and 7 are based upon my personal knowledge, and those set forth in paragraphs 4 and 5 are made on the basis of information I have obtained in the course of this representation that I believe to be true.

3. Included within the Appendix to Dead Sea and BCL's Memorandum of Law in Opposition to Plaintiffs' Motion to Remand under Tabs "C" through "KK" are true and correct copies of documents previously produced by Dead Sea and BCL in prior DBCP litigations, including English language translations of the Companies' Articles of Association, the legislative concessions pursuant to which they operate, Israel's Government Companies Law and various business records maintained in the Companies' files are more fully described in ¶ 23 of the Declaration of Noah Ehrlich, executed December 18, 1997, annexed as Exhibit A.

4. Attached in the Appendix under Tabs "LL"; "MM"; "PP"; "SS" are true and correct copies of orders or decisions entered in other proceedings.

5. Attached in the Appendix under Tab "NN" is an excerpt from the brief filed in the United States Supreme Court by respondents in Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir.), cert. denied sub nom., Fletcher's Fine Foods v. Gates, 116 S. Ct. 187 (1993), in opposition to a petition for certiorari.

6. Attached in the Appendix under Tab "001" and "002" are true and correct copies of an order and a transcript of proceedings in Delgado.

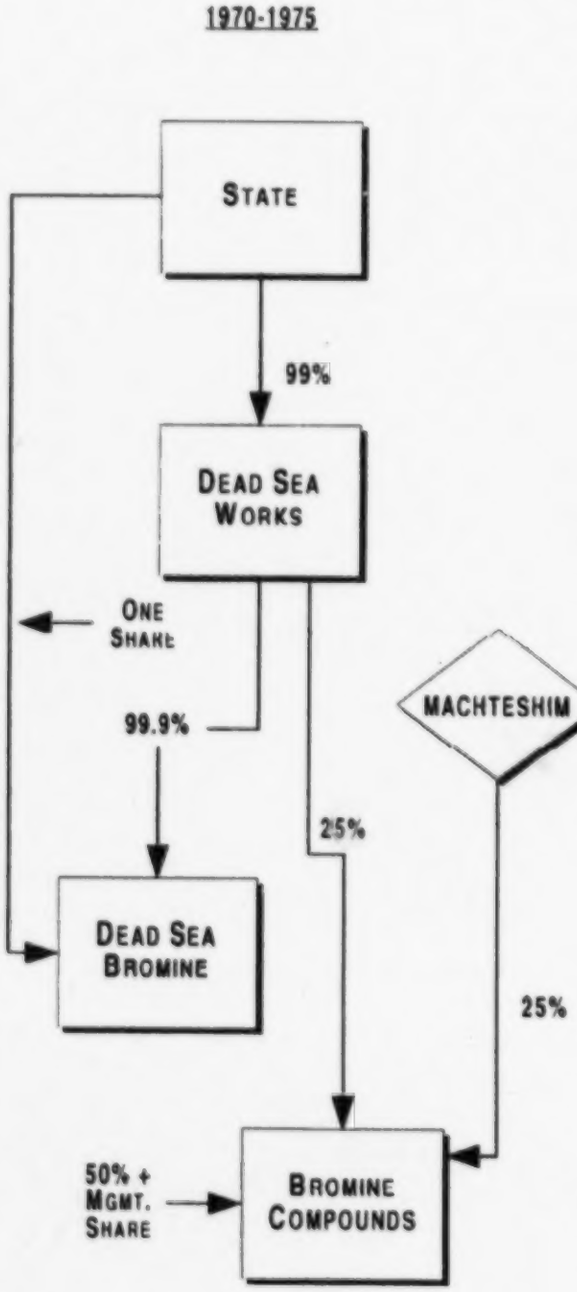
7. Attached in the Appendix under Tab "TT" is a true and correct copy of the transcript of the deposition of Noah Ehrlich taken in Martinez.

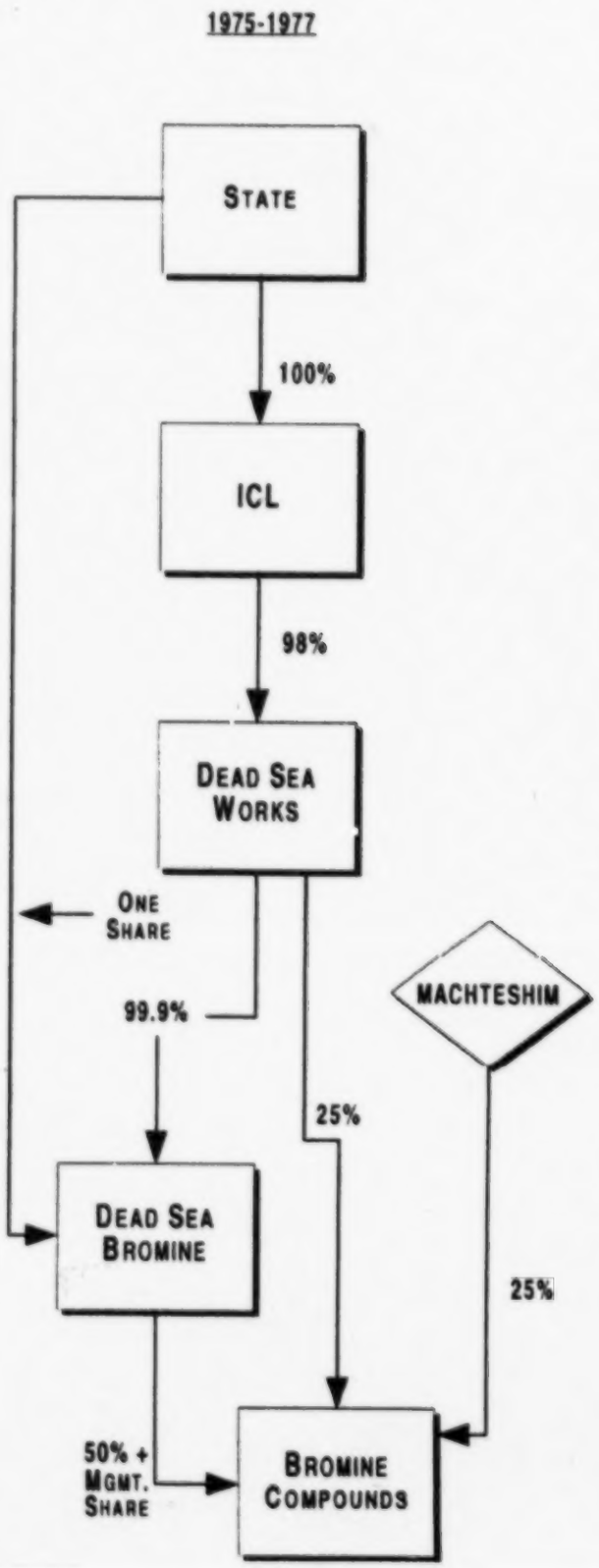
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed at New York, New York
on March 16, 1998.

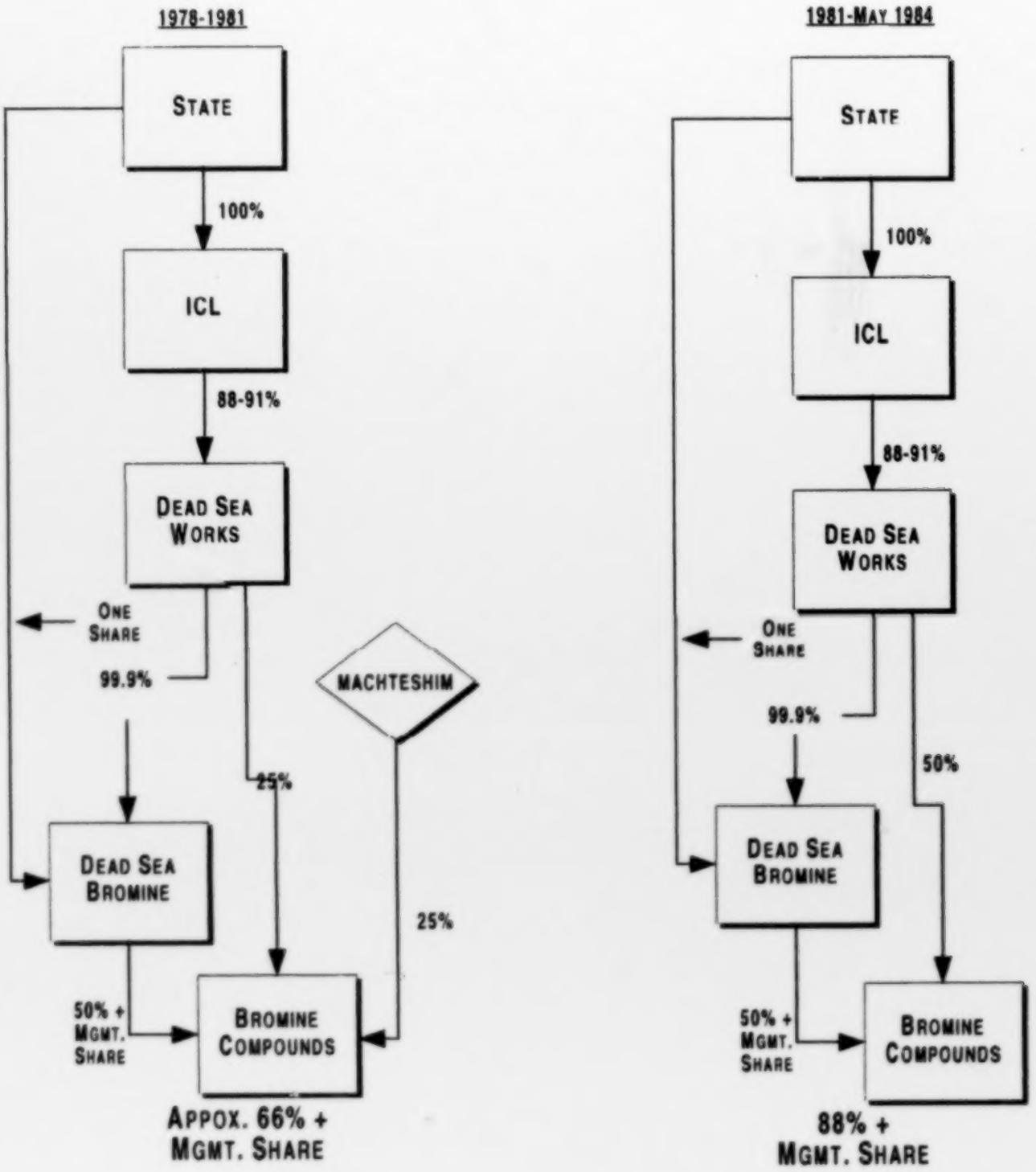
/s/
Peter R. Paden

Bromine Compounds, Ltd. Ownership Chart

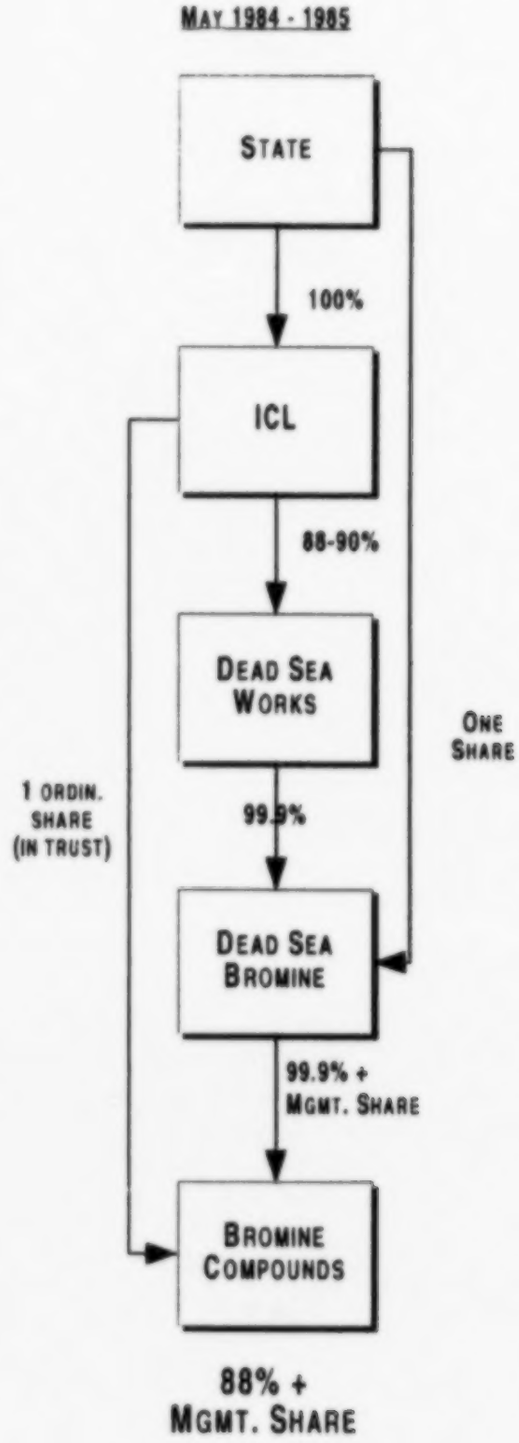




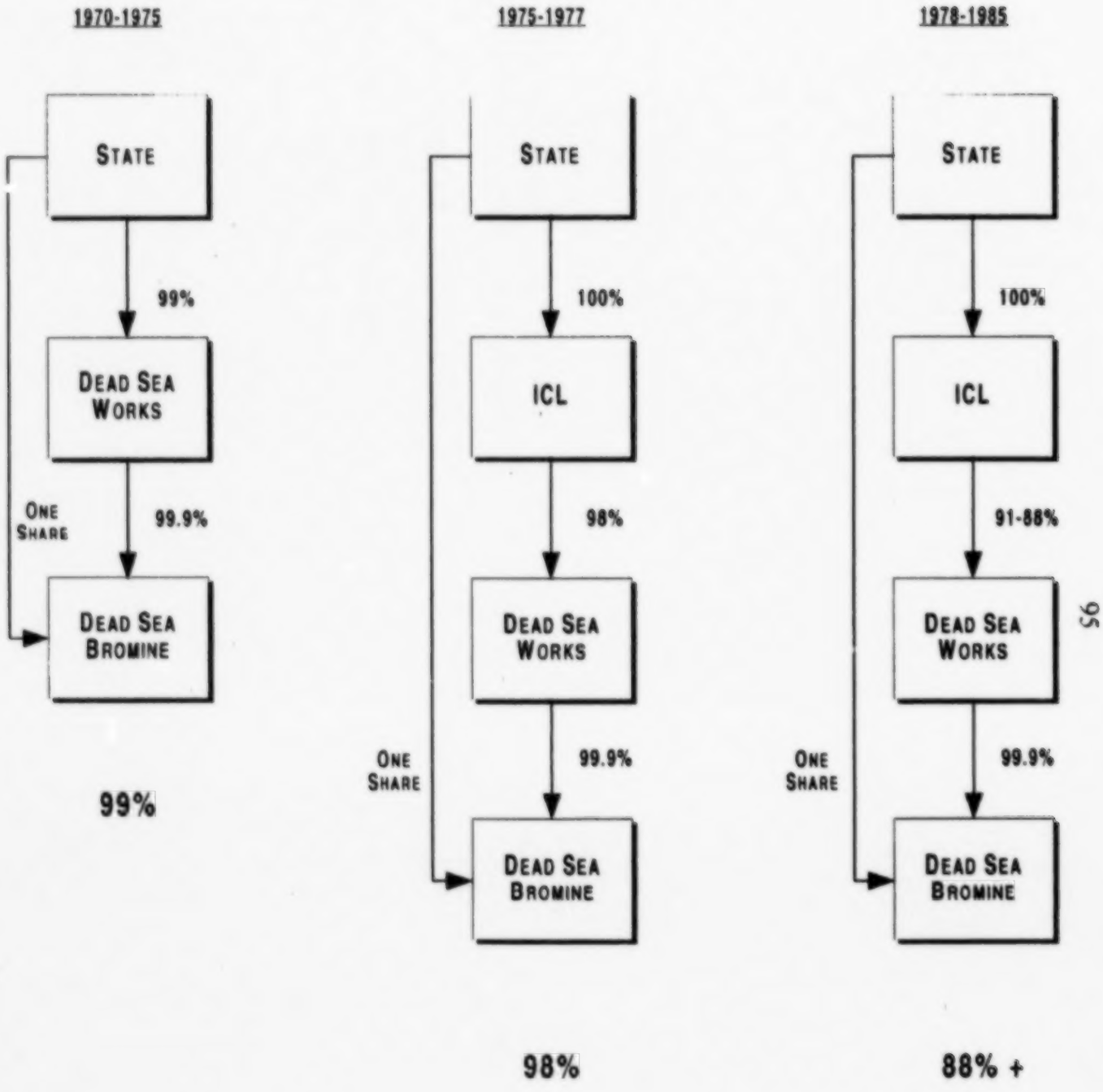
Bromine Compounds, Ltd. Ownership Chart



Bromine Compounds, Ltd. Ownership Chart



Dead Sea Bromine Company, Ltd. Ownership Chart



THE COMPANIES ORDINANCE
COMPANY LIMITED BY SHARES

ARTICLES OF ASSOCIATION
OF
DEAD SEA BROMINE COMPANY LTD.

(These Articles of Association have been adopted by a Special Resolution on _____, 1986 and they replace the former Articles of Association).

INTERPRETATION

1. In these Articles the words standing in the first column of the table next Whereinafter contained shall bear the meanings set opposite them respectively in the second column thereof, if not inconsistent with the subject or context:

Words	**Meanings**
The Company	The above-named Company.
Companies Ordinance	The Companies Ordinance (new Version), 5743-1983 ("The Companies Ordinance"), as amended and as shall be amended from time to time including any law or statute replacing it.
The Law	The Government Companies Law, 5735-1975, as amended and as shall be amended from time to time including any law or statute replacing it.
Government Company	A company in which more than half of the voting power at general meetings or the right to appoint more than half the number of directors is held by the State of Israel or by the State of Israel together with a Government Company or a Government Subsidiary Company.

Words	Meanings
The Government	The Government of Israel on behalf of the State of Israel.
Government Subsidiary Company	A company in which more than half of the voting power at general meetings or the power to appoint more than half of the members of the board of directors is held by the Government, a government company (as defined in the Law), a Government Subsidiary Company or a Government Company together with a Government Subsidiary Company or with the State of Israel.
The Ministers	The Minister of Finance together with the Minister designated under the Law as responsible for the affairs of the Company.
The Committee	The Finance Committee of the Knesset.
The Authority	The Government Companies Authority as defined in the Law.
The ICL Concern	Israel Chemicals Ltd. and its subsidiary companies.

Words	Meanings
The Statutes	The Companies Ordinance, The Securities Law, 5728-1968, the Government Companies Law, 5735-1975, as amended and as shall be amended from time to time including any law or statute replacing it, and every other Ordinance or Law for the time being in force concerning joint stock companies and affecting the Company.
These Articles	These Articles of Association or as shall be altered from time to time by Special Resolution.
The Office	The registered office for the time being of the Company.
The Seal	The rubber stamp of the Company.
Month	Gregorian month.
The President	The General Manager of the Company as defined within the Law.

Words	Meanings
Officer	A Director, General Manager, Chief Executive Officer, Deputy General Manager, Vice General Manager, any other manager directly subordinate to the General Manager, and any person who fills one of the said positions in the Company, even if he carries a different title.
Writing	Printing, lithography, photography, and any other mode or modes of representing or reproducing words in a visible form.

Words importing the singular only shall include the plural, and vice versa.

Words importing the masculine gender shall include the feminine gender; and words importing person shall include corporations.

Subject as aforesaid, any words or expressions defined in the Statutes shall, except where the subject or context forbids, bear the same meanings in these Articles.

2. The Articles found in the Second Schedule to the Companies Ordinance shall not apply to the Company.

NON-PRIVATE COMPANY

3. The Company is a non-private company; consequently:

(1) No limitations, except for those arising out of the rights attached to the Special State Share, will apply to the transfer of its paid up shares;

(2) The number of shareholders is unlimited;

(3) The company may issue to the public shares, debentures or any other securities.

3A. The on-going management of the Company, control over its business and its principal place of business shall be in Israel.

Any change or amendment to or cancellation of this Article 3A shall be deemed to be a change in the rights attached to the Special State Share, and shall not be effected other than with the consent of the holder of the Special State Share. Every resolution or activity which is contrary to or not in accordance with this Article 3A shall be void and invalid without the consent of the holder of the Special State Share.

Any consent or waiver or approval by the holder of the Special State Share shall be in writing.

4. The share capital of the Company is 50,000,000 (Fifty Million) New Israeli Shekels, divided into 49,999,999 (Forty Nine Million Nine Hundred Ninety Nine Thousand Nine Hundred Ninety Nine) Ordinary Shares of a nominal value of 1 (One) New Israeli Shekel (NIS) each, all ranking pari-passu (hereinafter referred to as the "Ordinary Shares"), and One Share of a nominal value of (one) New Israeli Shekel (NIS) which is a special state share (hereinafter referred to as the "Special State Share"):

OVERRIDING EFFECT OF THE LAW

5. For so long as the Company is a Government Subsidiary Company or a Government Company, all of the provisions of the Law shall override any contrary provisions found herein.

These Articles will be interpreted, as far as possible, such that their provisions will not be inconsistent with the cogent provisions of the Law, insofar as the Law applies to the Company. In the event of an inconsistency between the

cogent provisions of the Law and the provisions of these Articles, then the cogent provisions of the Law will prevail.

SHARES

6. Subject to the provisions of the Law, and of these Articles or the terms of any resolution creating new shares, the unissued shares from time to time shall be under the control of the Board of Directors, who shall have the power to allot shares or otherwise dispose of them to such persons, on such terms and conditions, and either at par or at a premium, or, subject to the provisions of the Statutes, at a discount, and at such times, as the Board of Directors may think fit, and the power to give to any person the option to acquire from the Company any shares, either at par or at a premium, or, subject as aforesaid, at a discount, during such time and for such consideration as the Board of Directors may think fit.

7. If two or more persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividends or other moneys in respect of such share.

8. No person shall be recognized by the Company as holding any share upon any trust, and the Company shall not be bound by or required to recognize any equitable, contingent, future, or partial interest in any share or any right whatsoever in respect of any share other than an absolute right to the entirety thereof in the registered holder.

9. Every member shall be entitled without payment to receive within six months after allotment or registration of transfer (unless the conditions of issue provide for a longer interval) one certificate under the Seal for all the shares registered in his name, specifying the number and denoting numbers of the shares in respect of which it is issued and the amount paid up thereon. Provided that in the case of joint holders the Company shall not be bound to issue more than one certificate to all the joint holders, and delivery of such certificate to one of them shall be sufficient delivery to all.

Every certificate shall be signed by one Director and countersigned by the Secretary to the Company or some other person nominated by the Directors for the purpose.

10. If any share certificate shall be defaced, worn out, destroyed or lost, it may be renewed on such evidence being produced, and such indemnity (if any) being given as the Directors shall require and (in case of defacement or wearing out) on delivery up of the old certificate, and in any case on payment of such sum not exceeding NIS 5 (Five New Israeli Shekels) or as the Directors may from time to time require.

11. No part of the funds of the Company shall be employed in the purchase of or in loans upon the security of the Company's shares, but nothing in this Article shall prohibit the transactions mentioned in the proviso to Section 139 of the Companies Ordinance.

12. Where any shares are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a length period, the Company may pay interest on so much of such share capital as is for the time being paid up for the period, and subject to the conditions and restrictions mentioned in Section 140 of the Companies Ordinance, and may charge the sum so paid by way of interest to capital as part of the cost of the construction of the work or building or the provision of a plant.

13. The Company may pay a commission at a rate not exceeding ten percent of the price at which the shares or other securities are issued to any person in consideration of his subscribing or agreeing to subscribe (whether absolutely or conditionally) for any shares in the Company, or other securities of the Company, or procuring or agreeing to procure subscriptions (whether absolute or conditional) for any shares in the Company or other securities of the Company.

13A. The Ordinary Shares will be equal in rights, and will give the holders thereof the right to receive notices concerning the General Meetings of the Company, to participate and vote therein, to appoint the members of the Board of Directors as detailed hereinbelow, and to participate in the division of profits of the Company and the assets remaining after fulfillment by the Company of all its debts in the event of the winding-up of the Company.

13B. The Special State Share may not be sold or transferred from the State of Israel's name and shall confer upon its holder for the purpose of the safeguarding of the State's Vital Interests, as outlined below, the following rights:

(1) A Transfer, as defined below, other than in the ordinary course of the Company's business, shall be invalid without the consent of the holder of the Special State Share, who shall be entitled to object to a Transfer only if said Transfer may, in his opinion, prejudice one of the State's Vital Interests as outlined below:

In this Article each of the following shall constitute a "Transfer," whether effected at one time, in parts, in one transaction or in a series of transactions:

(a) A transfer or allotment of shares or other securities in the Company, including securities held by the Company in another corporate body, in consequence whereof another person shall hold more than 25% of the voting rights in the Company or said other corporate body, or in consequence whereof the control of the Company or said other corporate body is transferred or is likely to be transferred in the future to another holder;

(b) Should the Company cease to be a Government Subsidiary Company, a sale or transfer of the assets vital to the existence and development of the Company or maintenance of its production capacity or the granting of any right in aforesaid assets. These assets shall include the

following whether or not protected by patents or other intellectual property rights: production lines, including production facilities, mining and quarrying rights, marketing set-ups, know-how and technology.

(2) None of the following resolutions shall be valid without the consent of the holder of the Special State Share:

(a) resolutions as to voluntary liquidation;

(b) resolutions as to a compromise or arrangement pursuant to section 233 of the Companies Ordinance;

(c) resolutions as to an alteration to or reorganization of the Company's structure;

(d) resolutions as to a merger except for mergers of corporate bodies controlled by a company within the ICL Concern that do not prejudice the rights or powers of the holder of the Special State Shares.

(3) (a) Any acquisition or holding of shares in the Company of 14% or more of the Company's issued share capital shall not be valid vis-à-vis the Company unless the consent of the holder of the Special State Share has been received in respect thereof.

(b) Any acquisition or holding of shares in the Company of 25% or more of the Company's issued share capital (including the augmentation of an existing holding up to 25%) shall not be valid vis-à-vis the Company unless the consent of the holder of the Special State Share has been received in respect thereof even if consent in accordance with Article 13B(3)(a) above was previously received in respect of a holding of less than 25%.

(c) In addition to the foregoing, the consent of the holder of the Special State Share shall be required for each portion of a shareholding in the share capital of the Company which confers upon the holder thereof the right, or actual or potential ability to appoint directly or indirectly a number of

directors in the Company constituting half or more of the members of the Board of Directors of the Company as hold office from time to time. The holding of a portion of the share capital in respect of which the consent of the holder of the Special State Share as aforesaid is required, shall not be valid vis-à-vis the Company until such time as consent as aforesaid has been received.

(d) The holder of the Special State Share shall be entitled to make his consent pursuant to this Article 13B(3) subject to any conditions which he deems necessary to secure the State's Vital Interests. Furthermore, he shall be entitled to waive any of the rights conferred upon him pursuant to these Articles upon terms and conditions he shall determine, in respect of a particular shareholder, for a fixed period or permanently. Any waiver as aforesaid shall not be deemed a change to or amendment of these Articles or of the rights attached to the Special State Share.

(e) Any transaction creating a charge over and/or pledge of and/or encumbrance of shares in the Company which confers on the chargee or pledgee rights as a result of the exercise or operation of which said chargee or pledgee may hold shares in the Company's share capital in the percentages set forth in Articles 13B(3)(a), 13B(3)(b) and 13B(3)(c) inclusive, or increase his holdings to the said percentages, shall not be valid without the consent of the holder of the Special State Share, and all the provisions of this Article 13B(3) in relation to a transaction shall apply mutatis mutandis to said charge and/or pledge.

(4) The holder of the Special State Share shall be entitled, upon his demand, to receive from the Company all information and documents which a holder of Ordinary Shares of the Company is entitled to receive, and in addition thereto he shall be entitled to receive all information and documents which a Director is entitled to receive or which a Public Director is entitled to receive pursuant to Section 96(12) of the

Companies Ordinance. All information which the Company's General Meeting receives or is entitled to receive shall be given to the holder of the Special State Share prior to convening the General Meeting. The holder of the Special State Share shall use such information only in order to exercise his rights under these Articles for the purpose of safeguarding the State's Vital Interests.

(5) Any person who requests the consent of the holder of the Special State Share in respect of any of the matters requiring said consent according to these Articles shall make said request in writing to the holder of the Special State Share, and include in said request all the information necessary to make a decision regarding the giving of consent.

(6) The holder of the Special State Share shall be deemed to have given his consent to the operations mentioned in Articles 13B(1), 13B(2) and 13B(3)(d) hereof, if at the end of 90 days from the date on which he was requested in writing to give his consent, he has not expressly withheld his consent, unless one of the Ministers holding the Special State Share seeks to raise the matter for discussion in the Government within said 90 day period.

(7) Any consent or waiver or approval by the holder of the Special State Share shall be in writing. Any refusal, waiver or consent by the holder of the Special State Share will be valid from the time it is given unless expressly stated otherwise.

(8) The State's Vital Interests are:

(a) Preservation of the character of the Company as an Israeli company whose center of business and management is in Israel.

(b) Supervision of the control of quarries and natural resources for their efficient development and exploitation, including maximum application in Israel of the results of the investments, research and development.

(c) Prevention of the achievement of a position of influence in the Company by hostile elements or elements which may prejudice the State's foreign and defense interests.

(d) Prevention of the achievement of a position of influence in the Company or the management of the Company where such acquisition or management could create a material conflict of interest which may prejudice one of the vital interests particularized in sub-paragraphs (a), (b) and (c) above.

(9) In this Article and in Article 18 hereof, "holding" and "acquisition" of shares, "control" and "affiliate" shall have the meaning ascribed to these terms in Section 1 of the Securities Law, 5728-1968, provided that "holding" shall include a holding by shareholders operating in concert or together or in cooperation, although in measuring the holding of a shareholder, his holding by means of an affiliate, whose securities have been offered to the public, shall not be taken into account if the affiliate is not in the sole control of said shareholder or in the control of said shareholder together with other parties who hold securities of the Company.

(10) The rights specified in this Article 13B and in Article 18 hereof are the rights attached to the Special State Share, and, other than these rights, no voting rights or capital rights are attached to the Special State Share.

Every change in these Articles which is likely to affect, directly or indirectly, the rights attached to the Special State Share shall be deemed to be a change in the rights attached to the Special State Share. Every resolution or activity which is likely to affect, directly or indirectly, the rights attached to the Special State Share shall require the consent of the holder of the Special State Share, and shall be void and invalid unless the consent of the holder of the Special State Share has been obtained.

Any change or amendment to or cancellation of this Article 13B shall be deemed to be a change in the rights attached to the Special State Share, and shall not be effected other than with the consent of the holder of the Special State Share. Every resolution or activity which is contrary to or not in accordance with this Article 13B shall be void and invalid without the consent of the holder of the Special State Share.

Any consent or waiver or approval by the holder of the Special State Share shall be in writing.

THE COMPANIES ORDINANCE

COMPANY LIMITED BY SHARES

ARTICLES OF ASSOCIATION

OF

BROMINE COMPOUNDS LTD.

THE COMPANIES ORDINANCE
COMPANY LIMITED BY SHARES
ARTICLES OF ASSOCIATION
of
BROMINE COMPOUNDS LTD.

(These Articles Association have been adopted by a Special Resolution on February __, 1992, and they replace the former Articles of Association).

INTERPRETATION

1. In these Articles the words standing in the first column of the table next Whereinafter contained shall bear the meaning set opposite them respectively in the second column thereof, if not inconsistent with the subject or context:

Words	**Meanings**
The Company	The above-named Company.
Companies Ordinance	The Companies Ordinance (new Version), 5743-1983 ("The Companies Ordinance"), as amended and shall be amended from time to time including any law or statute replacing it.
The Law	The Government Companies Law, 5735-1975, as amended and as shall be amended from time to time including any law or statute replacing it.

Government Company	A company in which more than half of the voting power at general meetings or the right to appoint more than half the number of directors is held by the State of Israel or by the State of Israel together with a Government Company or a Government Subsidiary Company.
The Government	The Government of Israel on behalf of the State of Israel.
Government Subsidiary Company	A company in which more than half of the voting power at general meetings or the power to appoint more than half of the members of the board of directors is held by the Government, a government company (as defined in the Law), a Government Subsidiary Company or a Government Company together with a Government Subsidiary Company or with the State of Israel.
The Ministers	The Minister of Finance together with the Minister designated under the Law as responsible for the affairs of the Company.
The Committee	The Finance Committee of the Knesset.
The Authority	The Government Companies Authority as defined in the Law.

The ICL Concern	Israel Chemicals Ltd. and its subsidiary companies.
The Statutes	The Companies Ordinance, the Securities Law, 5728-1968, the Government Companies Law, 5735-1975, as amended and as shall be amended from time to time including any law or statute replacing it, and every other Ordinance or Law for the time being in force concerning joint stock companies and affecting the Company.
These Articles	These Articles of Association or as shall be altered from time to time by Special Resolution.
The Office	The registered office for the time being of the Company.
The Seal	The rubber stamp of the Company.
Month	Gregorian month.
The President	The General Manager of the Company as defined within the Law.
Officer	A Director, General Manager, Chief Executive Officer, Deputy General Manager, Vice General Manager, any other manager directly subordinate to the General Manager, and any person who fills one of the said positions in the Company, even it he carries a different title.

Writing	Printing, lithography, photography, and any other mode or modes of representing or reproducing words in a visible form.

Words importing the singular only shall include the plural, and vice versa.

Words importing the masculine gender shall include the feminine gender; and words importing person shall include corporations.

Subject as aforesaid, any words or expressions defined in the Statutes shall, except where the subject or context forbids, bear the same meanings in these Articles.

2. The Articles found in the Second Schedule to the Companies Ordinance shall not apply to the Company.

PRIVATE COMPANY

3. The Company is a private company and accordingly:

(a) The number of members for the time being of the Company (exclusive of persons who are in the employment of the Company and persons who having been formerly in the employment of the Company were, while in such employment, and have continued after such employment to be, members of the Company) is not to exceed fifty (50), but where two (2) or more persons hold one (1) or more share(s) in the Company jointly, they shall, for the purposes of this paragraph, be treated as a single member;

(b) Any invitation to the public to subscribe for any shares or debentures or debenture stock of the Company is hereby prohibited:

(c) The right of transfer of shares shall be restricted as hereinafter provided.

3A. The on-going management of the Company, control over its business and its principal place of business shall be in Israel.

Any change or amendment to or cancellation of this Article 3A shall be deemed to be a change in the rights attached to the Special State Share, and shall not be effected other than with the consent of the holder of the Special State Share. Every resolution or activity which is contrary to or not in accordance with this Article 3A shall be void and invalid without the consent of the holder of the Special State Share.

Any consent or waiver or approval by the holder of the Special State Share shall be in writing.

4. The share capital of the company is 70,200,000.0001 (Seventy Million, Two Hundred Thousand and One Ten Thousandth) New Israeli Shekels, divided into 390,000,000 (Three Hundred and Ninety Million) Ordinary Shares of nominal value of 0.18 (Eighteen One Hundredths) New Israeli Shekel (NIS) each, all ranking pari-passu (hereinafter referred to as the "Ordinary Shares"), and One Share of a nominal value of 0.0001 (One Ten Thousandth) New Israeli Shekel (NIS) which is a special state share (hereinafter referred to as the "Special Sate Share").

OVERRIDING EFFECT OF THE LAW

5. For so long as the Company is a Government Subsidiary Company or a Government Company, all of the provisions of the Law shall override any contrary provisions found herein.

These Articles will be interpreted, as far as possible, such that their provisions will not be inconsistent with the cogent provisions of the Law, insofar as the Law applies to the Company. In the event of an inconsistency between the cogent provisions of the Law and the provisions of these Articles, then the cogent provisions of the Law will prevail.

SHARES

6. Subject to the provisions of the Law, and of these Articles or the terms of any resolution creating new shares, the unissued shares from time to time shall be under the control of the Board of Directors, who shall have the power to allot shares or otherwise dispose of them to such persons, on such terms and conditions, and either at par or at a premium, or, subject to the provisions of the Statutes, at a discount, and at such times, as the Board of Directors may think fit, and the power to give to any person the option to acquire from the Company any shares, either at par or at a premium, or, subject as aforesaid, at a discount, during such time and for such consideration as the Board of Directors may think fit.

7. If two or more persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividends or other moneys in respect of such share.

8. No person shall be recognized by the Company as holding any share upon any trust, and the Company shall not be bound by or required to recognize any equitable, contingent, future, or partial interest in any share or any right whatsoever in respect of any share other than an absolute right to the entirety thereof in the registered holder.

9. Every member shall be entitled without payment to receive within six months after allotment or registration of transfer (unless the conditions of issue provide for a longer interval) one certificate under the Seal for all the shares registered in his name, specifying the number and denoting numbers of the shares in respect of which it is issued and the amount paid up thereon. Provided that in the case of joint holders the Company shall not be bound to issue more than one certificate to all the joint holders, and delivery of such certificate to one of them shall be sufficient delivery to all. Every certificate shall be signed by one Director and countersigned by the Secretary to the Company or some other person nominated by the Directors for the purpose.

10. If any share certificate shall be defaced, worn out, destroyed or lost, it may be renewed on such evidence being produced, and such indemnity (if any) being given as the Directors shall require and (in case of defacement or wearing out) on delivery up of the old certificate, and in any case on payment of such sum not exceeding NIS 5 (Five New Israeli Shekels) or as the Directors may from time to time require.

11. No part of the funds of the Company shall be employed in the purchase of or in loans upon the security of the Company's shares, but nothing in this Article shall prohibit the transactions mentioned in the proviso to Section 139 of the Companies Ordinance.

12. Where any shares are issued for the purpose of raising money to defray the expenses of the construction of any works or buildings or the provision of any plant which cannot be made profitable for a length period, the Company may pay interest on so much of such share capital as is for the time being paid up for the period, and subject to the conditions and restrictions mentioned in Section 140 of the Companies Ordinance, and may charge the sum so paid by way of interest to capital as part of the cost of the construction of the work or building or the provision of a plant.

13. The Company may pay a commission at a rate not exceeding ten percent of the price at which the shares or other securities are issued to any person in consideration of his subscribing or agreeing to subscribe (whether absolutely or conditionally) for any shares in the Company, or other securities of the Company, or procuring or agreeing to procure subscriptions (whether absolute or conditional) for any shares in the Company or other securities of the Company.

13A. The Ordinary Shares will be equal in rights, and will give the holders thereof the right to receive notices concerning the General Meetings of the Company, to participate and vote therein, to appoint the members of the Board of Directors as detailed hereinbelow, and to participate in the division of

profits of the Company and the assets remaining after fulfillment by the Company of all its debts in the event of the winding-up of the Company.

13B. The Special State Share may not be sold or transferred from the State of Israel's name and shall confer upon its holder, for the purpose of the safeguarding of the State's Vital Interests, as outlined below, the following rights:

(1) A Transfer, as defined below, other than in the ordinary course of the Company's business, shall be invalid without the consent of the holder of the Special State Share, who shall be entitled to object to a Transfer only if said Transfer may, in his opinion, prejudice one of the State's Vital Interests as outlined below.

In this Article each of the following shall constitute a "Transfer", whether effected at one time, in parts, in one transaction or in a series of transactions:

(a) A transfer or allotment of shares or other securities in the Company, including securities held by the Company in another corporate body, in consequence whereof another person shall hold more than 25% of the voting rights in the Company or said other corporate body, or in consequence whereof the control of the Company or said other corporate body is transferred or is likely to be transferred in the future to another holder;

(b) Should the Company cease to be a Government Subsidiary Company, a sale or transfer of the assets vital to the existence and development of the Company or maintenance of its production capacity or the granting of any right in aforesaid assets. These assets shall include the following whether or not protected by patents or other intellectual property rights: production lines, including production facilities, mining and quarrying rights, marketing set-ups, know-how and technology.

(2) None of the following resolutions shall be valid without the consent of the holder of the Special State Share:

(a) resolutions as to voluntary liquidation;

(b) resolutions as to a compromise or arrangement pursuant to section 233 of the Companies Ordinance;

(c) resolutions as to an alteration to or reorganization of the Company's structure;

(d) resolutions as to a merger except for mergers of corporate bodies controlled by a company within the ICL Concern that do not prejudice the rights or powers of the holder of the Special State Share.

(3) (a) Any acquisition or holding of shares in the Company of 14% or more of the Company's issued share capital shall not be valid vis-à-vis the Company unless the consent of the holder of the Special State Share has been received in respect thereof.

(b) Any acquisition or holding of shares in the Company of 25% or more of the Company's issued share capital (including the augmentation of an existing holding up to 25%) shall not be valid vis-à-vis the Company unless the consent of the holder of the Special State Share has been received in respect thereof even if consent in accordance with Article 13B(3)(a) above was previously received in respect of a holding of less than 25%.

(c) In addition to the foregoing, the consent of the holder of the Special State Share shall be required for each portion of a shareholding in the share capital of the Company which confers upon the holder thereof the right, or actual or potential ability to appoint directly or indirectly a number of directors in the Company constituting half or more of the members of the Board of Directors of the Company as hold office from time to time. The holding of a portion of the share capital in respect of which the consent of the holder of the Special State

Share as aforesaid is required, shall not be valid vis-à-vis the Company until such time as consent as aforesaid has been received.

(d) The holder of the Special State Share shall be entitled to make his consent pursuant to this Article 13B(3) subject to any conditions which he deems necessary to secure the State's Vital Interests. Furthermore, he shall be entitled to waive any of the rights conferred upon him pursuant to these Articles upon terms and conditions he shall determine, in respect of a particular shareholder, for a fixed period or permanently. Any waiver as aforesaid shall not be deemed a change to or amendment of these Articles or of the rights attached to the Special State Share.

(e) Any transaction creating a charge over and/or pledge of and/or encumbrance of shares in the Company which confers on the chargee or pledgee rights as a result of the exercise or operation of which said chargee or pledgee may hold shares in the Company's share capital in the percentages set forth in Articles 13B(3)(a), 13B(3)(b) and 13B(3)(c) inclusive, or increase his holdings to the said percentages, shall not be valid without the consent of the holder of the Special State Share, and all the provisions of this Article 13B(3) in relation to a transaction shall apply mutatis mutandis to said charge and/or pledge.

(4) The holder of the Special State Share shall be entitled, upon his demand, to receive from the Company all information and documents which a holder of Ordinary Shares of the Company is entitled to receive, and in addition thereto be shall be entitled to receive all information and documents which a Director is entitled to receive or which a Public Director is entitled to receive pursuant to Section 96(12) of the Companies Ordinance. All information which the Company's General Meeting receives or is entitled to receive shall be given to the holder of the Special State Share prior to convening the General Meeting. The holder of the Special

State Share shall use such information only in order to exercise his rights under these Articles for the purpose of safeguarding the State's Vital Interests.

(5) Any person who requests the consent of the holder of the Special State Share in respect of any of the matters requiring said consent according to these Articles shall make said request in writing to the holder of the Special State Share, and include in said request all the information necessary to make a decision regarding the giving of consent.

(6) The holder of the Special State Share shall be deemed to have given his consent to the operations mentioned in Articles 13B(1), 13B(2) and 13B(3)(d) hereof, if at the end of 90 days from the date on which he was requested in writing to give his consent, he has not expressly withheld his consent, unless one of the Ministers holding the Special State Share seeks to raise the matter for discussion in the Government within said 90 day period.

(7) Any consent or waiver or approval by the holder of the Special State Share shall be in writing. Any refusal, waiver or consent by the holder of the Special State Share will be valid from the time it is given unless expressly stated otherwise.

(8) The State's Vital Interests are:

(a) Preservation of the character of the Company as on Israeli company whose center of business and management is in Israel.

(b) Supervision of the control of quarries and natural resources for their efficient development and exploitation, including maximum application in Israel of the results of the investments, research and development.

(c) Prevention of the achievement of a position of influence in the Company by hostile elements or elements which may prejudice the State's foreign and defense interest.

(d) Prevention of the achievement of a position of influence in the Company or the management of the Company where such acquisition or management could create a material conflict of interest which may prejudice one of the vital interests particularized in sub-paragraphs (a), (b) and (c) above.

(9) In this Article and in Article 18 hereof, "holding" and "acquisition" of shares, "control" and "affiliate" shall have the meaning ascribed to these terms in Section 1 of the Securities Law, 5728-1968, provided that "holding" shall include a holding by shareholders operating in concert or together or in cooperation, although in measuring the holding of a shareholder, his holding by means of an affiliate, whose securities have been offered to the public, shall not be taken into account if the affiliate is not in the sole control of said shareholder or in the control of said shareholder together with other parties who hold securities of the Company.

(10) The rights specified in this Article 13B and in Article 18 hereof are the rights attached to the Special State Share, and, other than these rights, no voting rights or capital rights are attached to the Special State Share.

Every change in these Articles which is likely to affect, directly or indirectly, the rights attached to the Special State Share shall be deemed to be a change in the rights attached to the Special State Share. Every resolution or activity which is likely to affect, directly or indirectly, the rights attached to the Special State Share shall require the consent of the holder of the Special State Share, and shall be void and invalid unless the consent of the holder of the Special State Share has been obtained.

Any change or amendment to or cancellation of this Article 13B shall be deemed to be a change in the rights attached to the Special State Share, and shall not be effected other than with the consent of the holder of the Special State Share. Every resolution or activity which is contrary to or not in

accordance with this Article 13B shall be void and invalid without the consent of the holder of the Special State Share.

CALLS ON SHARES

14. No member shall be entitled to receive any dividend or to exercise any privileges as a member until he shall have paid all calls for the time being due and payable on every share held by him, whether alone or jointly with any other person, together with interest and expenses (if any).

15. (a) If under the conditions of the issuance of shares there is no fixed date for the payments due therefor, the Directors may from time to time make such calls upon the members in respect of all moneys then unpaid on shares possessed by them and every member will pay the sum demanded of him at the place and time appointed by the Directors, provided that fourteen days notice as to the place and date of payment was served on him. The Directors may revoke or postpone any call.

(b) A call shall be deemed to have been made at the time when the Resolution of the Directors authorizing such call was passed.

(c)The joint holders of a share shall be jointly and severally liable for the payment of all calls and installments in respect thereof.

(d) If before or on the day appointed for payment thereof, a call or installment payable in respect of a share is not paid, the holder or allottee of the share shall pay interest on the amount of the call or installment at such rate not exceeding the debitory rate prevailing at the largest Israeli commercial bank on the day appointed for the payment referred to, as the Directors shall fix, from the day appointed for payment thereof to the time of actual payment, but the Directors may waive payment of such interest wholly or in part.

(No. 56)

DEAD SEA CONCESSION LAW, 5721-1961*

The Concession.

I. The Deed of Concession set out in the Schedule to this Law, made between the State and the Concessionaire specified therein, shall be deemed to be valid for all its purposes notwithstanding anything provided in any law.

Subconcessions.

2. Any subconcession which may be granted under the provisions of clause 5 of the Deed of Concession shall be published in *Reshumos* and upon being so published shall be deemed to be valid for all its purposes notwithstanding anything provided in any law.

Implementation.

3. The Minister of Finance and Development are charged with the implementation of this Law.

SCHEDULE

THIS DEED OF CONCESSION is made this 31st day of May, 1961, between the STATE OF ISRAEL represented by the Government of Israel, acting through the Minister of Finance and the Minister of Development (hereinafter referred to as "Government") of the one part, and MIFALEI YAM HAMELAH B. M. (Dead Sea Works Limited), a company incorporated under the laws of Israel, whose registered office is situate at Potash House Beersheba (hereinafter referred to as "the Concessionaire") of the other part.

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* Passed by the Knesset on the 16th Sivan, 5721 (31st May, 1961) and published in *Sefer Ha-Chukkim* No. 342 of the 27th Sivan, 5721 (11th June, 1961), p. 130.

WHEREAS: —

(A) The minerals of the Dead Sea and the surrounding area form part of the natural resources of the State of Israel, and it is desirable to regulate the efficient exploitation thereof in the interests of the economy of the State;

(B) The Concessionaire was incorporated with the object, among others, of examining, exploring and developing the natural mineral resources of the Dead Sea and the surrounding areas;

(C) The Concessionaire has since its incorporation been developing and exploiting some of the said natural mineral resources and has in connection therewith acquired and built in and in the vicinity of the southern part of the Dead Sea certain works and facilities;

(D) The Concessionaire has applied to Government for the Concession hereinafter appearing, and Government is prepared to grant the same to the Concessionaire on the terms and conditions hereinafter set forth;

NOW THEREFORE THIS DEED OF CONCESSION WITNESSETH, AND IT IS HEREBY AGREED AND DECLARED, as follows:—

Interpretation.

I. Unless the context otherwise requires the following words and expressions shall have the following meanings set out opposite thereto, that is to say: —

The auditor	The auditor or auditors for the time being of the Concessionaire.
Commencement date	The date on which the law approving the Concession shall come into force.
Concession	The Concession granted by this Deed of Concession.

Concessionaire	Dead Sea Works Limited and its successors under this deed of concession.
Dead Sea	(a) The waters and bed of that Part of the Dead Sea lying within the frontiers of the State of Israel, as shown on map "A" attached to this Deed of Concession[1]) and signed by the parties thereto and forming an integral part thereof; (b) The evaporation area shown on the said map "A" and thereon delineated and hatched black; and (c)The strip of shore bounded: on the north by Co-ordinate line 100, and on the south by the said evaporation area and on the east by the water line as shown on the said map "A" and on the west by an imaginary line running parallel to such water line at a distance of 150 metres therefrom.
Fused tangible assets	Lands, buildings, plant, machinery, dams, dykes, evaporation pans, sluices, gates, pumping stations, flood protection works, pipes and fixtures and other equipment of every nature forming part of the Undertaking and situate in the leased lands, the reserved lands or the Dead Sea.
Land	includes any right, interest, easement or incumbrance in or over land.
Leased lands	The lands for the time being leased to the Concessionaire under Clause 6 of this Deed.

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[1] A copy of this map is included in the Hebrew text but is not reproduced in this translation — Tr.

Local authority	Includes municipal corporation, local council, regional council and any other local body entitled to levy any local rates.
Local rates	Any rate or tax which will at any rime be imposed by a local authority in connection with the business of the Undertaking, its property or income (except governmental taxes, rates, charges and compulsory payments).
The Minister	The Ministers of Finance and Development.
Month	A Gregorian calendar month.
Reserved lands	The lands shown on the said map "A" and thereon cross-hatched in thick black lines.
Ton	Metric ton of 1000 kilograms.
The Undertaking	The business of obtaining, rendering marketable, selling and disposing of mineral salts, minerals and chemicals and all businesses, property and things as shall be necessary or incidental thereto, all in accordance with this Concession.
Year	A period of twelve consecutive months.

Grant of Concession.

2. Government hereby grants to the Concessionaire the following Concession, namely,

(a) The exclusive right to obtain by evaporation (solar or artificial), cooling, mining, quarrying or otherwise howsoever, the mineral salts, minerals and chemicals, whether in solution or solid form, in and beneath the Dead Sea, and to render marketable, sell and dispose of the same;

(b) the exclusive right, subject to any rights existing at the date of this Deed, and subject to the provisions of Clause 3(3)

hereof, to execute, enlarge, alter, maintain and pull down, any works in and beneath the Dead Sea, including, but without derogating from the generality of the foregoing, dykes, evaporation pans, sluices, gates, pumping stations, canals, pipes, power transmission lines and cables, roads, flood-protection works, wells, bores and other facilities together with the exclusive right of access to such works and user thereof;

(c) the right to navigate vessels on the Dead Sea for the purposes of the Undertaking, subject to the laws for the time being in force;

(d) the right, with the approval of the Competent Authority and subject to the rights existing at the date of this Deed and subject to any right which will be granted after such date under Clause 9(1) (b) of this Deed, to do all or any of the following acts in the leased lands and the reserved lands: —

(i) to obtain by quarrying, mining or any other means of extraction howsoever, dolomite rocks and such other rocks and such mineral salts, minerals and chemicals as the Concessionaire may from time to time require for use in any process employing mineral salts, minerals and chemicals obtained or obtainable from the Dead Sea, and to quarry for rock salt in and about Mount Sdom; and

(ii) to quarry for materials necessary for constructing, enlarging and maintaining the Undertaking;

The Competent Authority shall not refuse to give its approval under this sub-clause and the same shall be granted within 30 days of the submission of the application therefor;

(e) the right, subject to the approval of the competent water authority, which approval shall not be unreasonably withheld or delayed, to obtain fresh or brackish water required for the production of mineral salts, minerals and chemicals for drinking, washing or sanitary purposes and the general

purposes of the Undertaking and of the employees of the Concessionaire from streams or springs flowing through or rising in the leased lands and the reserved lands or from wells situated therein or from any affluents to the Dead Sea and to bore for fresh or brackish water in the leased lands and the reserved lands, and in connection therewith to sink wells, lay pipes, construct pumping stations and such other works as shall be necessary or incidental thereto.

Exceptions and reservations.

3. (1) There are excepted and reserved to Government, out of the grant hereinbefore contained —

(a) gold, silver or other precious metals and their ores, precious stones, copper and iron ores, antiquities and petroleum as defined in the Petroleum Law, 5712-1952 (hereinafter collectively referred to as "the excepted substances"), in or beneath the Dead Sea, the leased lands or the reserved lands;

(b) the right to enter upon any facilities and property of the Concessionaire in or beneath the Dead Sea, the leased lands or the reserved lands for the purpose of making any surveys or inspections in connection with the matters stated in Sub-Clause 1(a) of this Clause.

(2) The Concessionaire shall forthwith upon the discovery of any of the excepted substances, give Government notice of such discovery, and shall permit Government or any person authorized by it to enter upon any place as mentioned in Sub-Clause 1(b) for the purpose of exploring for and obtaining the excepted substances and Government shall pay the Concessionaire compensation for any damage thereby occasioned to the Concessionaire.

(3) Government shall be entitled to permit any person to erect on the strip of shore referred to in sub-paragraph (c) of the definition of Dead Sea, any works, not relating to the

Undertaking, PROVIDED THAT such works shall not interfere or compete with the Undertaking or the development thereof.

Before permitting any such works as aforesaid, Government shall give to the Concessionaire not less than four months prior notice in writing of its intention, and shall set out in such notice the location and area of the said strip of shore in respect of which Government proposes to grant such permit, and the nature of the work to be carried out thereon, and the Concessionaire shall be entitled within four months from receipt of such notice, to notify Government in writing that the Concessionaire objects to the granting of the proposed permission and the reasons for its objection, and in the event that Government will reject any such objection the matter shall before the grant of any such permission, be referred to and determined by arbitration in pursuance of Clause 26 hereof. If the Concessionaire does not notify Government that it objects to the granting of the permission within four months from receipt of the said notice, the Concessionaire will be deemed to have agreed to the granting of the permission.

Duration of Concession.

4. The duration of this Concession shall be for a period commencing on the day on which the law approving the Concession shall come into force, and terminating on the 14th Nisan, 5759 (31st March, 1999).

Sub-concession and licences.

5. (a) the Concessionaire shall have the right, with the consent of Government and the approval of the Finance Committee of the Knesset, to grant sub-concessions under the Concession.

(b) In the event that the Concessionaire grants in accordance with the terms hereof any sub-concession, the sub-concessionaire shall, subject to the provisions of the sub-concession, have all the rights, privileges, powers and immunities, duties and obligations of the Concessionaire to the

extent granted or imposed upon the Sub-Concessionaire in such sub-concession, all within the framework of this Deed of Concession.

Lands.

6. (a) Government hereby leases to the Concessionaire for the duration of the Concession the lands shown in map "A" and thereon coloured black on the terms and conditions hereinafter set out.

(b) The rental to be paid in respect of the lands mentioned in Sub-Clause (a) of this Clause shall be 1L. 10. — in respect of the whole of the first ten years of the lease (which shall be payable on demand of Government), and thereafter shall be a fair rental based on the value of the said lands, disregarding any increase in their value due to the operations or requirements of the Concessionaire. The said rental for the period after the expiry of the first ten years of the lease shall be paid yearly in arrear on the anniversary date of the Concession.

(c) Government shall wherever so required by the Concessionaire, lease or cause the Development Authority or the Israel Lands Authority to lease to the Concessionaire any part of the reserved lands required for the Undertaking being lands vested in the State or the Development Authority for the unexpired period of the Concession. During the first ten years from the commencement date, the rental to be paid in respect of such lands shall be nominal and thereafter shall be a fair rental based on the value of such lands, disregarding any increase in land value due to the operations or requirements of the Concessionaire and on the terms, *mutatis mutandis*, applicable to the lands mentioned in Sub-Clause (a) of the Clause.

(d) The Concessionaire shall use the leased lands exclusively for the purposes of the Undertaking.

(e) There are excepted out of the lease granted under this Clause all public roads passing through the leased lands.

(f) If at the expiration of the first ten years from the commencement date it shall transpire that the Concessionaire does not reasonably require the whole of any such lands comprised in any lease granted under sub-clause (c) hereof for the purposes of the Undertaking, having regard to the production capacity of the Undertaking at such time, Government shall be entitled at any time thereafter to require the Concessionaire, by giving not less than twelve months prior notice in writing to that effect, to surrender such unrequired part. No such surrender shall, however, prevent the Concessionaire from subsequently requiring Government to lease or cause to be leased such lands to the Concessionaire in accordance with sub-clause (c) of this Clause.

(g) Lands within the reserved lands which may from time to time be required for the Undertaking, not being lands vested in Government or the Development Authority, shall be acquired by private treaty between the Concessionaire and the persons entitled to such land, and failing agreement, such land shall be expropriated by the Minister of Finance in accordance with the provisions of the Land (Acquisition for Public Purposes) Ordinance, 1943.

(h) Where land is acquired by private treaty or expropriation as specified in sub-clause (g) of this Clause, the price thereof or the compensation therefor shall be paid by the Concessionaire and the title to such land shall be vested in the Concessionaire.

(i) The Concessionaire shall be entitled to grant sub-leases or licences in respect of any of the lands leased to it under this Deed of Concession to any sub-concessionaire in pursuance of Clause 5 hereof, or with the consent of Government to others.

Registration of lands.

7. Government shall as soon as possible cause the registration in the name of the Concessionaire at the competent Land Registry of leases in respect of lands for the time being leased in pursuance of Clause 6 hereof. It is, however, hereby declared that any such lease shall be valid notwithstanding the failure to effect registration thereof as aforesaid. PROVIDED THAT the Concessionaire shall, within 30 days of the receipt from Government of a notice to that effect, appear at the competent Land Registry and execute all such documents as may be necessary to effect such registration. The registration aforesaid and the issue of certificates of registration in respect thereof to the Concessionaire shall be effected free of registration fees and any other imposts whatsoever.

Mortgage of leased lands.

8. The Concessionaire shall not be entitled to create any mortgage or fixed charge on the leasehold interest in the leased lands without the prior or consent in writing of the Minister. Any mortgage or charge created with such consent as aforesaid in respect of any leased lands as aforesaid not registered in the Land Registry shall, notwithstanding such non-registration, be valid, PROVIDED THAT the mortgage is duly registered in accordance with Section 127 of the Companies Ordinance and PROVIDED FURTHER that the holder of such mortgage or charge shall, within three months from receiving notice from Government of the registration of such lands in the competent Land Registry apply to such Land Registry for the registration of such mortgage or charge.

Reserved Lands.

9. (1) Government shall not, during the period of the Concession -

(a) grant to any person other than the Concessionaire possession or licence of land in the reserved lands without first offering the same to the Concessionaire on the terms provided in Clause 6(c) hereof; nor

(b) grant in or over the reserved lands to any person, other than the Concessionaire, any right, licence or concession for the mining or exploration by other means of any of the mineral salts, minerals and chemicals obtainable from the Dead Sea, without first offering such right, licence or concession to the Concessionaire. If such offer shall not be accepted by the Concessionaire within eighteen months after the same shall have been communicated to the Concessionaire, Government shall be at liberty to grant such right, licence or concession to such other person on terms not more favourable than those offered to the Concessionaire. PROVIDED THAT no such right or licence or concession as aforesaid shall be granted by Government to such other person as aforesaid if such grant will have a negative or adverse influence on the interests or business of the Undertaking or of that of any sub-concessionaire of the Concessionaire relating to the Concession or sub-concession; nor

(c) grant to any person other than the Concessionaire, any right, licence or concession for the extraction of rock salt in the leased lands or the reserved lands, save only to such persons who were entitled so to do on the date of the Concession, and with regard to such persons the Government shall be entitled to renew their licences, concession or rights or in lieu thereof to give to them new licences, concession or rights as aforesaid, without having first to offer such rights, licences or concessions to the Concessionaire. In such event the provisions of paragraph (b) of this sub-section, including the proviso at the end thereof, shall *mutatis mutandis* apply.

(2) The Concessionaire shall be entitled, with the approval of Government, to dispose of any waste products formed in the course of operating the Undertaking to a suitable place in the reserved lands.

Quiet enjoyment during Concession period.

10. The Concessionaire shall, during the period of the Concession, enjoy absolute and undisturbed possession of the Undertaking nor shall the Undertaking be compulsorily acquired, requisitioned or taken possession of by any other compulsory means.

Public works.

11. Nothing in this Deed contained shall prevent Government or any local authority from carrying out nor shall it prevent Government from permitting any other body authorised by law to carry out such works, to carry out in, over or beneath the leased lands or reserved lands any public works, including public roads, railways, electric wires or cables, bridges, pipes and pipelines, PROVIDED ALWAYS that—

(i) the public works so carried out shall not unreasonably interfere with the carrying out of works required for the Undertaking, nor the proper and normal functioning of the Undertaking; and

(ii) all necessary precautions shall be taken by whoever will carry out the public works so as to prevent damage to the Undertaking or any property belonging to or in the possession or control of the Concessionaire; and

(iii) Government or the local authority or whoever will carry out the public works, as the case may be, shall indemnify the Concessionaire against any loss or expense which the Concessionaire may sustain as a result of or in connection with the carrying out of such public works.

Before carrying out or permitting the carrying out of any such works, Government or the local authority shall give the Concessionaire prior written notice of not less than 90 days of its intention and shall attach thereto the plans of such works. The said notice shall specify the location of such works and the manner in which it is proposed to fulfill the conditions set out in the sub-clauses (i) and (ii) of this Clause. The Concessionaire shall inform Government in writing within 90 days from the date of the delivery of the said notice whether it objects to the carrying out of the public works and the reasons for its objections, and in the event that Government will reject such objections, the matter shall be referred to and determined by arbitration in pursuance of Clause 26 hereof before the carrying out of the said works as aforesaid. If the Concessionaire does not give notice of its objection within 90 days from the date of receipt of the said notice, the Concessionaire shall be deemed to have agreed to the carrying out of the works or to the granting of the permission for the carrying out of the same.

Concessionaire's duty to work.

12. The Concessionaire shall, during the period of the Concession, with all due diligence, continue to work and extract the said mineral salts, minerals and chemicals, and to get, win, carry away and market the same in accordance with the provisions of this Concession and increase within a reasonable time the capacity of the Undertaking for the production of potassium chloride by an additional 400,000 tons approximately per year above its present capacity of 165,000 tons per year.

Subject to the Concessionaire being able to provide the necessary moneys from internally generated funds and otherwise, on reasonable terms, it shall at a later stage use its best efforts further to increase the capacity of the Undertaking for the production of potassium chloride by an additional 200,000 to 300,000 tons approximately per year.

Products not produced by Concessionaire.

13. (a) If at any time after the expiry of three years from the commencement date Government shall desire the Concessionaire to commence the production of a product of which one or more of the components shall be mineral salts, minerals or chemicals obtainable from the Dead Sea, not being a product then manufactured by the Concessionaire or its sub-concessionaires, Government shall be entitled by notice in writing to request the Concessionaire to inform Government within six months of the date of receipt of such notice (hereinafter referred to as "the reply period") whether the Concessionaire is prepared to produce such product.

The Concessionaire shall, during the reply period, be entitled to object in writing to the notice of Government on the ground that the product to which the notice relates is not a product as stated in this sub-clause or that the product is one the manufacture of which would have a negative or adverse influence on the interests or business of the Undertaking, or those of the sub-concessionaires of the Concessionaire in connection with the said sub-concession or on the ground that the provisions of this sub-clause have otherwise not been complied with. In the event of any difference of opinion, the matter shall be referred to and determined by arbitration in accordance with the provisions of Clause 26 hereof.

(b) Every notice from Government under this Clause shall contain a detailed description of the product to be produced and the process for the production of such product and shall contain an undertaking from Government to give, or cause to be given, to the Concessionaire upon request, sufficient knowhow, on reasonable terms, to enable the Concessionaire to produce the product in commercial quantities in accordance with the process mentioned in the notice, and also to grant, or cause to be granted, to the Concessionaire, all such licences under patents relating to the product and the process as to protect the Concessionaire against any infringement suits.

The notice shall specify the name and address of the owner of the knowhow or the patent, as the case may be, and shall be accompanied by a copy of the specification and claims of the patent and shall set forth the conditions on which the owner of the said knowhow or the said patent is prepared to supply such knowhow, or to grant a licence under such a patent to the Concessionaire, as the case may be. The Company shall not deliver to others any knowhow or patent which it has received as aforesaid.

(c) If the Concessionaire shall notify Government in writing within the reply period that it is prepared to produce such product in commercial quantities to be agreed to by the parties, the Concessionaire shall commence to carry out the works necessary for such production and shall complete the same within such period as shall be agreed between Government and the Concessionaire. In the event that the parties shall fail to reach agreement as to the quantities of the product, the period for the commencement of the erection of the works, or the period for the completion thereof, the matter shall be referred to and determined by arbitration in accordance with the provisions of Clause 26 hereof.

(d) If the Concessionaire shall notify Government in writing within the reply period that it is not prepared to produce such product, but that it has no objection to Government granting to another person the right to produce such product, or if the Concessionaire shall fail to reply in writing during the reply period, Government shall be entitled to grant to another person the right to produce such product, on terms which shall not be more favourable than those set forth in the notice, and thereafter the Concessionaire shall be bound to supply to such persons, on reasonable terms, such end brine from the Dead Sea as will be reasonably required for such production, subject to there being sufficient end brine available in excess of the requirements of the Concessionaire and its sub-concessionaires.

(e) If Government and the Concessionaire shall fail to reach agreement within three months from the date of a final award in the arbitration rejecting the objections of the Concessionaire as aforesaid in sub-clause (a) as to the quantities to be produced, the time for commencement of the erection of the necessary works for the production of the product and for the completion of the same, the matter shall be referred to and determined by arbitration in accordance with the provisions of Clause 26 hereof.

(f) If the Concessionaire shall fail to commence the erection of the necessary works, or to complete the same within the periods agreed upon between Government and the Concessionaire, or determined upon by the arbitrators, as the case may be, Government shall be entitled to grant to another person the right to produce such product on terms which shall not be more favourable then those set forth in the notice as stated above, and thereafter the Concessionaire shall be bound to supply to such person, on reasonable terms, such end brine from the Dead Sea as shall reasonably be required for such production, subject to there being sufficient end brine available in excess of the requirements of the Concessionaire and its sub-concessionaires.

No contract for restriction of output.

14. The Concessionaire and any sub-concessionaires of the Concessionaire shall not, without the previous consent in writing of Government, make any contract or arrangement with any person for the restriction of the output of the products of the Concessionaire or for raising or keeping up prices in such a way as to restrict output. The provision of this Clause shall be in substitution for the Restrictive Trade Practices Law, 5719-1959, which shall not apply to the Concessionaire and its sub-concessionaires with regard to the subconcession.

Royalties.

15. (a) In consideration of all the rights and privileges granted to the Concessionaire by this Deed of Concession, except the lease referred to in Clause 6 above (in respect of which rent will be paid as stated in the said Clause 6) the Concessionaire shall pay to Government commencing the year beginning 1st April, 1964, and thereafter in each year, the following royalties, namely —

(1) a royalty equal to 5% of the value of potassium chloride, bromine and magnesium chloride produced by the Undertaking and sold in such year and such value shall be ascertained in the manner hereinafter appearing:

The value or every product referred to in this sub-Clause shall be ascertained at the end of each year and shall be the value thereof ex works unpacked. Such value shall be determined by taking the sales price (including any benefits to the extent that the same shall be granted) during such year and deducting from such price the following amounts, that is to say —

(i) The proper costs of packing, sales commission and transport and insurance from the works of the Concessionaire to the place of destination agreed upon with the customer; and

(ii) 10% of the amount which shall remain after deducting from the said sales price all the proper costs referred to in paragraph (i) of this sub-clause.

If the production and sales of potassium chloride in any year shall exceed 1,000,000 tons Government shall be entitled to demand reconsideration of the amount of the royalties to be paid in regard to the quantity in excess of 1,000,000 tons of potassium chloride sold in such year, PROVIDED THAT the royalties on such excess shall

in no event exceed 10% of the sales price calculated as above.

(2) A royalty equal to 5 per cent, of the value of products other than products referred to in sub-clause (1) above, produced by the Undertaking and sold in such year and consisting of, or comprising mineral salts, minerals and chemicals obtained from the Dead Sea, and such value shall be ascertained in the manner hereinafter appearing. The value of every product referred to in this sub-clause shall be ascertained at the end of each year and shall be the value thereof ex works unpacked; such value shall be determined by taking the sales price (including any benefits to the extent that the same shall be granted) during such year and deducting from such price the following amounts, that is to say: —

(i) The proper costs of raw materials (not being mineral salt, minerals and chemicals obtained from the Dead Sea) present in the product sold, plus 15% of such proper costs; and

(ii) The proper costs of packing, sales commission and transport and insurance from the works of the Concessionaire to the place of destination agreed upon with the customer; and

(iii) 10% of the amount which shall remain after deducting from the said sales price all proper costs referred to in paragraph (ii) of this sub-clause.

(b) Government shall be entitled, with the approval of the Finance Committee of the Knesset, to reduce the royalties payable in respect of products referred to in sub-clause (a) (2) of this Clause.

(c) The amount of the royalties for each year shall be ascertained and certified by the auditor. The sum due shall be paid to Government by the Concessionaire within 120 days of

the expiry of each year in respect of which the royalties are payable.

(d) Royalties payable by the Concessionaire to Government under this Deed of Concession shall, for the purpose of the Income Tax Ordinance, be deemed to be an expense wholly and exclusively incurred in the production of the income of the Concessionaire.

(c) For the purposes of this Clause, the expression "year" means a year commencing on the 1st day of April, and expiring on the following 31st day of March.

Accounts and returns.

16. (a) The Concessionaire shall keep at all times at its principal office all usual and proper books of account to be open at all reasonable times for inspection by the representatives of Government upon notice in advance.

(b) The Concessionaire shall send to Government every year a duty audited balance sheet and profit and loss account and a detailed return certified by an auditor, giving all such particulars as shall be required for calculating the royalties payable to Government in such year in accordance with Clause 15 above.

Transport facilities.

17. Government shall provide and maintain for the period of the Concession suitable and sufficient roads or railways and port facilities so as to enable the transportation of the products of the Concessionaire and the shipment of the same by sea from ports in Israel.

Communications.

18. Government shall, subject to the Post Office Ordinance, permit the Concessionaire to set up, maintain and operate, at its own expense, a telecommunication system (which expression shall include a telegraph and telephone system,

whether overhead or underground, teleprinter, telecommunication and wireless installations) providing communication between the various establishments of the Undertaking, but any such communication system shall be used exclusively for the purpose of the Undertaking and shall be subject to the supervision of Government and shall not be so constructed or operated as to interfere with the operations of any competent authority.

Public health.

19. The Concessionaire shall comply with all laws relating to public health and safety and with such provisions of the Mining Ordinance and the Factories Ordinance, 1947[2]), and Regulations made thereunder relating to health and safety of workers.

Payment in lieu of local rates.

20. (a) The Minister of Finance and the Minister of the Interior may by order provide that the Concessionaire shall during the whole or any part of the period of the Concession pay to Government a fixed rate to be agreed upon between the Minister of Finance, the Minister of the Interior and the Concessionaire; such rate shall be in lieu of local rates.

(b) Upon such order coming into operation, no local authority shall be entitled to impose upon or collect from the Concessionaire any local rates, and the Minister of the Interior will distribute among the local authorities concerned in such manner and in such proportions as he may from time to time deem fit all the moneys which shall have been received by Government under this Clause in lieu of all the rates which, but for the provisions of this Clause and such order as aforesaid, would have been payable by the Concessionaire.

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[2] This apparently refers to the Factories Ordinance, 1946, now known as the Work Safety Ordinance, 1946-Tr.

(c) Nothing in this clause or in any such order as aforesaid, shall derogate from any relief or exemption from local rates to which the Concessionaire may at any time be or become entitled to by virtue of the provisions of the Law for the Encouragement of Capital Investments 5719-1959, or any other law, and in making any such order as aforesaid the Minister of Finance and the Minister of the Interior shall give effect to such relief or exemptions as aforesaid.

Prohibition of assignment.

21. Without the prior written consent of Government, and with the approval of the Finance Committee of the Knesset, the Concessionaire shall not be entitled to assign, mortgage or dispose of the Concessionaire or any part thereof.

Force majeure.

22. Failure or omission or breach, whether by the Concessionaire or Government, in the observance or performance of any of the stipulations, agreements or conditions in this Concession contained and on the part of either party to be observed or performed, shall not give rise to any claim or demand by one party against the other party, nor in any manner operate to the prejudice of the other party, or be deemed a breach of this Concession, if it be reasonably shown that the non-performance or non-observance has arisen from any one or more of the following causes: Act of God, acts of foreign rulers or peoples, acts of infiltration, war, warlike operations, blockade, embargo, insurrection, rebellion, riots, strikes and lockouts or labour disputes, fire, storm, tempest, explosion, earthquake, floods or other causes beyond the control of the parties.

Remedies.

23. (a) If any of the parties hereto shall fail to observe or perform any of the stipulations, agreements or conditions in this Concession contained and on the part of such party to be observed and performed, the defaulting party (hereinafter

referred to as "the defaulter") shall pay the other party (hereinafter referred to as "the aggrieved party") damages in an amount sufficient to indemnify the aggrieved party against the loss sustained by such failure.

(b) If the aggrieved party contends that the failure to observe or perform on the part of the defaulter is of so grave a nature as to be of the essence of this Concession, the aggrieved party may by notice in writing to the defaulter require the latter to remedy the failure within such time as may be reasonable in the circumstances.

If the defaulter fails to comply with such requirement, the aggrieved party shall be entitled to refer to arbitration a claim to treat the Concession as terminated. If it is found upon arbitration that the breach was of the nature contended by the aggrieved party as aforesaid, the arbitration may decide to terminate this Concession as from such date as it may deem just in the circumstances and, subject to the provisions of Clause 24 hereof, the severance of the relations between the parties on such terms as it may deem just and matters incidental thereto. The arbitration may also in addition to or in place of termination of the Concession award damages or compensation or such other remedy or remedies as it may deem just under the circumstances, and in the event of termination of the Concession Government shall be entitled to set off the amount of any such damages or compensation awarded to it against any payment due from Government to the Concessionaire under Clause 24 hereof.

If the default consists in failure to grant any lease of any land under and in pursuance of Clause 6 hereof, the arbitration shall be entitled, in addition to any other remedy, to order Government to lease or cause to be leased to the Concessionaire such lands on terms to be fixed by it in conformity with Clause 6 hereof.

(c) If any order shall be made or an effective resolution passed for the winding up of the Concessionaire (otherwise

than for the purposes of amalgamation or reconstruction with the consent of Government and approval of the Finance Committee of the Knesset) such order or resolution shall be treated by the arbitration as a breach by the Concessionaire of its obligations under this Deed of Concession entitling Government to treat the Concession as terminated.

Treatment of assets on expiration of Concession.

24. (a) Upon the expiration or sooner determination of this Concession (hereinafter referred to as "termination date") all fixed tangible assets belonging to the Concessionaire shall become vested in Government, and Government shall pay to the Concessionaire in respect of such fixed tangible assets the depreciated replacement value thereof as at the termination date and all other property of any nature whatsoever belonging to the Concessionaire at the termination date shall remain the property of the Concessionaire.

The expression "depreciated replacement value" in relation to fixed tangible assets means the cost of acquiring similar assets when new at the market price prevailing at the termination date, less depreciation in respect of the period of user of each asset, such depreciation to be based on the technical life of such assets, taking into account the condition of maintenance of the same by the Concessionaire and the conditions prevailing in the Dead Sea area.

If at the termination date the fixed tangible assets or any part thereof shall be mortgaged or charged, such mortgage or charge shall continue to attach to such assets, but the depreciated replacement value thereof shall not be reduced by reason of such mortgage or charge and the following provisions shall apply: —

(I) Government shall be entitled to withhold from such depreciated replacement value such sum as will be sufficient to repay the principal and interest secured by such mortgage or charge as and when the same shall become

due, or a sum equal to the depreciated replacement value of the asset, whichever is the lower sum;

(II) In the event that Government shall withhold such sum as aforesaid, it shall apply the same in repaying the principal and interest secured by the mortgage or charge, or shall indemnify the Concessionaire up to the amount of the sum withheld in respect of such mortgage or charge, against all claims and demands by the mortgagee or chargee in respect of such principal or interest as aforesaid, and the balance of sum, if any, shall be repaid to the Concessionaire.

(b) The Concessionaire shall not, without the prior written consent of Government, during the ten years preceding the date of the expiration of this Concession, make any new capital investment in the Undertaking, unless such investment can be amortised in entirety during the said period of ten years in accordance with the Income Tax Ordinance, PROVIDED THAT the consent of Government to any basic investment which may be essential for the proper operation of the Undertaking shall not be unreasonably withheld or delayed.

Pre-emption for new Concession.

25. If, after the expiration of the Concession, Government shall desire to offer a new concession for the extraction of mineral salts, minerals and chemicals from the Dead Sea to any person other than the Concessionaire, Government shall first offer to the Concessionaire a new concession on terms not less favorable than those proposed to be offered to such other person.

Arbitration.

26. If at any time within the period of the Concession or thereafter, any doubt, difference, or dispute shall arise between the parties concerning the interpretation or execution of this Concession or anything connected therewith or concerning the rights and liabilities of the parties thereto, the same shall,

failing any agreement to settle the doubt, difference or dispute by other means and without taking into account whether or not there are any express provisions for the reference of the matter to arbitration under any other Clause of this Deed of Concession, be referred to the arbitration of three persons, one to be appointed by each party to the reference and the third to be appointed by writing under the hands of the two so appointed before the reference is proceeded with. Failing agreement by such two arbitrators as to the third arbitrator, such third arbitrator shall be appointed by the President for the time being of the District Court of Jerusalem.

In the event that the arbitration shall involve a matter of valuation or any other technical matter, the third arbitrator appointed as aforesaid shall be a technical expert competent in the particular matter.

The award of the three arbitrators shall be final and binding upon the parties. In the event that the arbitrators shall not be unanimous, the majority award shall be final and binding. The place of the arbitration shall be such as will be agreed between the parties and failing agreement shall be Jerusalem. Save where otherwise provided in this Deed of Concession, the provisions of the Arbitration Ordinance shall apply to any arbitration under this Clause.

Nothing in this Clause shall relieve Government from the necessity of obtaining the approval of the Finance Committee of the Knesset in such matters in which such approval is required under the terms of this Deed of Concession.

Notices.

27. Whenever any notices, consents, applications, requests or communications (hereinafter called "notices") are to be given hereunder, the notices shall be in writing and shall be deemed to be duly given if mailed by prepaid registered post to the parties at the following addresses:

Government at:	Ministry of Finance and Ministry of Development, Jerusalem.
The Concessionaire at:	Potash House, Beersheba.

or to such other address within the State of Israel as any of the parties may designate by a similar notice to the other.

Any notice to be sent shall be deemed to have been served at the expiration of seventy-two hours from the posting of the letter containing such notice duly addressed.

Waiver.

28. (a) The receipt by Government of any payment from the Concessionaire under this Concession, whether on account of royalties or otherwise, shall not be deemed to imply a waiver by Government of any rights in respect to any antecedent breach of any of the provisions of this Concession.

(b) No waiver by any party of any breach of any term hereof shall be considered as a waiver of any subsequent breach of that term or any other term, whether of the same or of a different nature.

Marginal notes.

29. The marginal notes herein provided shall not be relied upon in the construction of the provisions of this Concession.

Wavier of notarial notice.

30. The parties hereto hereby waive and agree to dispense with the necessity of any notarial or other official notice or protest in respect of any breach or default of any of the terms hereof.

Action by Government.

31. Anything under this Concession permitted to be done or exercised and any consent to be given by Government under this Concession shall be properly done, exercised or given by

the Minister or by any person appointed under his hand in that behalf.

IN WITNESS whereof the parties hereto have hereunto set their hands and seals on the day and year first hereinbefore mentioned.

Sgd. Israel Hillman	Sgd. M. Bentov, *Minister of Development*
Sgd. Emanuel Saham	Sgd. L. Eshrol, *Minister of Finance*
for and on behalf of MIRALLI YAM HAMELAH B.M.	for and on behalf of the State of Israel
DAVID BEN-GURION *Prime Minister*	LEVI ESHKOL *Minister of Finance*
MORDEKHAI BENTOV *Minister of Development*	YITZCHAK BEN-ZVI *President of the State*

(No. 40)

DEAD SEA CONCESSION (AMENDMENT) LAW, 5728-1968

Amendment of Concession.

1. The Deed of Amendment of Concession set out in the Schedule to this Law, made between the State and the Concessionaire named therein, shall be deemed to be valid for all its purposes notwithstanding anything provided in any law.

Commencement.

2. This Law shall have effect as from the 27th Sivan, 5721 (11th June, 1961).

SCHEDULE

This Deed of Amendment of Concession, made on the 21st Tammuz, 5728 (17th July, 1968)

between

THE STATE OF ISRAEL, represented by the Government of Israel acting through the Minister of Finance and the Minister of Development, of the one part

and

MIFALE YAM HAMELAH B.M. (Dead Sea Works Limited), a company incorporated under the laws of Israel, whose registered office is situated at Potash House, Beersheba, of the other part

hereby attests, and it is hereby agreed and declared as follows:

1. This Deed is an Amendment to the Deed of Concession made between the above-mentioned parties on the 15th Sivan, 5721 (30th May, 1961) (hereinafter referred to as "the Deed of Concession").

2. In Clause 15(a) of the Deed of Concession, the words "commencing in the year beginning 1st April, 1964" shall be replaced by the words "commencing in the year beginning the 1st April, 1970".

3. In Clause 18 of the Deed of Concession, the words "subject to the Post Office Ordinance" shall be replaced by the words "subject to the Wireless Telegraphy Ordinance".

In witness whereof the parties hereto have hereunto set their hand and seals on the day and year first hereinbefore mentioned.

PINCHAS SAPIR
Minister of Finance

MOSHE KOL
Minister of Development
for and on behalf of the State of Israel

EMANUEL SAHAR SHAUL TECHETCHIK
for and on behalf of Mifalei Yam Hamelah B.M.

LEVI ESHKOL
Prime Minister

PINCHAS SAPIN
Minister of Finance

MOSHE KOL
Minister of Development

SHNLUA ZALMAN SHAZAR
President of the State

Dead Sea Concession Law, 5721 – 1961

Sub-Concession of the DEAD SEA BROMINE COMPANY LTD.

Pursuant to clause 2 of the Dead Sea Concession Law, 5721-1961, a Sub-Concession granted under the provisions of clause 5 of the Deed of Concession in the Schedule to the Law by the Concessionaire specified in the said Deed of Concession to the Dead Sea Bromine Company Ltd., is hereby published in the following version:

This Deed of Sub-Concession is made this 14th day of Cheshvan, 5723 (11th of November, 1962).

between

Mifalei Yam Hamelah B.M. (Dead Sea Works Ltd.) a company incorporated under the laws of Israel, whose registered office is situate at Potash House, Beersheba (hereinafter referred to as "the Main Concessionaire") of the one part;

and

Dead Sea Bromine Company Ltd. a company incorporated under the laws of Israel, whose registered office is situate at the said Potash House, Beersheba (hereinafter referred to as "the Sub-Concessionaire") of the other part;

Whereas:-

(A) Under a Deed of Concession (hereinafter referred to as "the Main Concession") made on 30th of May 1961 between the Government of Israel (hereinafter referred to as "Government") of the one part and the Main Concessionaire of the other part, Government granted to the Main Concessionaire the exclusive right to obtain by evaporation (solar or artificial), cooling, mining, quarrying or otherwise howsoever, the mineral salts, minerals and chemicals, whether in solution or solid form, in and beneath the Dead Sea, and to

render marketable, sell and dispose of the same, and all other rights and privileges, subject to the obligations, terms and conditions set out in the Main Concession;

(B) Clause 5 of the Main Concession empowered the Main Concessionaire, with the consent of Government and the approval of the Finance Committee of the Knesset, to grant Sub-Concessions under the Main Concession;

(C) The Main Concessionaire has full control in the Sub-Concessionaire;

(D) The Main Concessionaire has, subject to the limitations, terms and conditions hereinafter set forth, agreed to grant to the Sub-Concessionaire a sub-concession to obtain bromine and bromine compounds from mineral salts, minerals and chemicals, whether in solution or solid form, which are in and beneath the Dead Sea, and to render marketable, sell and dispose of the same, and such other rights as are hereinafter set out, and the Sub-Concessionaire is prepared to accept such a Sub-Concession subject to the said limitations, terms and conditions;

(E) In a letter dated the 14th of Cheshvan, 5723 (11th of November, 1962) and signed by the Minister of Finance and the Minister of Development, Government agreed to grant the Sub-Concession to the Sub-Concessionaire as aforesaid.

It Is Hereby Agreed And Declared As Follows : -

1. (a) In this Sub-Concession, unless the context otherwise requires, the following words and expressions shall have the meanings set out opposite thereto, namely: bromine compounds - compounds in which bromine is an element or the derivatives of such compounds except for compounds in which bromine is a trace element only or compounds which though containing bromine are not generally described as bromine compounds in commerce or industry.

Concentrated solution - a solution originating in the Dead Sea and which underwent evaporation or any other treatment by the Main Concessionaire and is found in any of the production stages of potash or other products of mineral salts, minerals and chemicals which are in the Dead Sea, executed by the Main Concessionaire.

Solution from the Dead Sea - any solution from the Dead Sea, which did not undergo any evaporation or other treatment by the Main Concessionaire, The Undertaking, with respect to the Sub-Concessionaire the business of obtaining bromine and bromine compounds, and the rendering marketable, selling and disposing of the same, and such other business, properties and things of the Sub-Concessionaire necessary for or ancillary to the said business, all in accordance with the Sub-Concession.

(b) Words and expressions whose meaning are defined in the Main Concession shall be so defined in the Sub-Concession, unless the meaning of the context otherwise requires.

2. (a) the Main Concessionaire hereby grants to the Sub-Concessionaire -

(1) the exclusive right to obtain bromine and bromine compounds from mineral salts, minerals and chemicals, whether in solution or solid form, which are in and beneath the Dead Sea and to render marketable, sell and dispose of the same;

(2) the right, subject to the provisions of clause 2(d) of the Main Concession, to do all or any of the following acts in the leased lands and the reserved lands:

a) to obtain by quarrying, mining or any other means of extraction howsoever, such mineral salts, minerals and chemicals as the Sub-Concessionaire may from time to time require for use in any process of production of bromine

or bromine compounds employing mineral salts, minerals and chemicals obtained or obtainable from the Dead Sea.

b) to quarry for materials necessary for constructing, enlarging and maintaining the Undertaking.

(b) The Sub-Concessionaire shall, in order to exercise the rights granted thereto under sub-clause (a) of this clause, be entitled to enter the Dead Sea areas, the leased lands and the reserved lands at such points and upon such terms as shall from time to time be prescribed in writing by the Main Concessionaire (and such points, employed for the purpose of concentrated solution shall hereinafter be referred to as "Delivery Points"), to obtain solution from the Dead Sea, concentrated solution and other salt minerals, minerals and chemicals from which bromine and bromine compounds shall be extracted and to extract all the above mentioned in such quantities, with such means, in such manner and for such purpose as aforesaid, to lay pipes and construct pumping stations and such other works in or above the aforementioned areas as shall from time to time be prescribed in writing by the Main Concessionaire.

3. The Sub-Concession is granted for a period commencing on the date of the Sub-Concession or on the date on which the Sub-Concession shall be approved by the Finance Committee of the Knesset, whichever later date, and terminating one day before the expiration or sooner determination of the Main Concession, unless the Sub-Concession shall be terminated sooner, as hereinafter provided.

4. (a) The Main Concessionaire hereby sub-leases to the Sub-Concessionaire for the duration of the Sub-Concession, the lands shown in the Map marked 'A' and attached to the Sub-Concession, situated within the boundaries of the lands leased by the Main Concessionaire and delineated on the map by slanted dense dotted-lines, for such rent and upon such terms as hereinafter provided.

(b) The rental to be paid by the Sub-Concessionaire to the Main Concessionaire in respect of the sub-lease hereby granted shall be the amount of IL. 1.- (One Israel Pound) for a period commencing on the date on which the Sub-Concession shall come into force, and terminating 10 (ten) years after the commencement of the Main Concession, and thereafter shall be an amount equal to the rental payable by the Main Concessionaire to Government under the Main Concession in respect of the lands sub-leased hereunder, and payable yearly in advance one week before the anniversary date of the Main-Concession.

(c) If the Sub-Concessionaire shall require for its Undertaking or the expansion thereof additional lands being part of the leased lands or the reserved lands, the Main Concessionaire shall at the Sub-Concessionaires request sub-lease same thereto for the duration of the remaining period of the sub-lease. The Main Concessionaire, however, shall not be obligated to sub-lease as aforesaid any additional lands if same are required for the undertaking of the Main Concessionaire or of any other of its Sub-Concessionaires and any additional lands of the reserved lands, if it is unable to obtain a lease of those additional lands under clause 6(c) of the Main Concession.

(d) During the period commencing on the date on which the Sub-Concession shall come into force and terminating 10 (ten) years after the commencement of the Main Concession, the rental to be paid in respect of the additional lands shall be nominal and thereafter shall be an amount equal to the rental payable by the Main Concessionaire to Government under the Main Concession in respect of the said additional lands. The other Terms of the Sub-Concession shall, mutatis mutandis, be like the term applicable to the lands hereby sub-leased.

(e) If at the expiration of the first ten years from the commencement of the Main Concession it shall transpire that the Sub-Concessionaire does not reasonably require all the

lands comprised in any lease granted under sub-clause (c) hereof for the purposes of the Undertaking, having regard to the production capacity of the Undertaking at such time, the Main Concessionaire shall be entitled at any time to require the Sub-Concessionaire, by giving not less than twelve months' prior notice in writing to that effect, to surrender such unrequired part; No such surrender, however, shall prevent the Sub-Concessionaire from subsequently requiring the Main Concessionaire to lease such lands or cause such lands to be leased thereto in accordance with sub-clause (c) of this clause.

(f) The sub-lease hereby granted is subject to all the mortgages and charges created and to be created hereafter in favour of any trustee under any deed of trust signed pursuant to an agreement made on the 11th of July, 1961 between the International Bank for Rehabilitation and Development and the Main Concessionaire.

(g) The Sub-Concessionaire shall use the lands sub-leased thereto exclusively for the purposes of its Undertaking.

(h) There are excepted out of the sub-lease under this clause all public roads passing through the lands leased under the provisions of the Sub-Concession.

(i) Any sub-lease granted under this clause shall be valid notwithstanding the failure to effect registration thereof at the competent Land Registry, provided that when Government shall procure the registration of the lease of the lands specified in clause 7 of the Main Concession, the Sub-Concessionaire shall, within 30 (thirty) days of the receipt thereby from the Main Concessionaire of a notice to that effect, appear at the competent Land Registry and execute all such documents as may be necessary to effect the sub-lease granted pursuant to this clause. The registration aforesaid and the issue of certificates of registration to the Sub-Concessionaire in respect of the said lands shall be effected free of registration fees and any other imposts whatsoever.

(j) The Sub-Concessionaire shall not be entitled to create any mortgage or fixed charge on the leasehold interest without the prior consent of the Minister and the Main Concessionaire. Any mortgage or charge created with such consent as aforesaid in respect of any sub-leased lands not registered in the Land Registry shall, notwithstanding such non-registration, be valid, provided that the mortgage is duly registered in accordance with section 127 of the Companies Ordinance and provided further that the holder of such mortgage or charge shall, within three months from receiving notice from the Main Concessionaire of the registration of the said land in the said Land Registry, apply to the competent Land Registry for the registration of such mortgage or charge.

5. Notwithstanding any of the provisions in the Sub-Concession, the Whole area of the Dead Sea, and of the leased lands or the reserved lands on which part of the Undertaking of the Sub-Concessionaire is managed or on which installations or any other equipment of the Sub-Concessionaire are fixed, whether or not the area is sub-leased to the Sub-Concessionaire, may be used by the Main Concessionaire at all times for the following purposes:

(a) for entry for the purpose of making any inspection and surveys as it may deem fit,

(b) for passing through repeatedly with or without workers, contractors and vehicles in order to approach any part of the Undertaking of the Main Concessionaire and exit therefrom, along such pathways as the Main Concessionaire shall from time to time at its discretion prescribe;

(c) for laying pipes and cables, constructing pumping stations and other works, roads, railways and other means of transport, from one end to the other end, over or beneath the said areas.

6. In consideration of the expenses incurred by the Main-Concessionaire by reason of pumping concentrated solution up

to the delivery point and by reason of the repairing and maintaining of pipes, pumping units, installations, dams and evaporation pans of the Main Concessionaire, the Sub-Concessionaire shall pay the Main Concessionaire an amount of 20 (twenty) Agorot for each cubic meter of concentrated solution obtained by the Sub-Concessionaire at the delivery point in consequence of the Sub-Concession.

Payments under this clause shall be yearly and made on the 1st of January of each year, and the first payment shall be made on 1st of January, 1963.

If at any time, any one of the parties to the Sub-Concession shall maintain that the amount of the said payment should be modified, it shall be entitled to request the other party to agree to the modification and such other amount shall be paid from such date as agreed upon by the parties and, failing agreement, as determined by the arbitration in accordance with the provisions set out hereinafter in clause 23. So long as no award is made by the arbitration, the amount payable shall continue to be that which was in effect prior to the requested modification.

7. If the Main Concessionaire shall execute in or about the Dead Sea, the leased lands or reserved lands, public works, including flood-protection works, railways, roads, water - electricity - gaz - or fuel works, and such public works shall be likely to benefit the Undertaking of the Sub-Concessionaire, the Sub-Concessionaire shall participate in the execution and maintenance expenses in such manner as shall deem fit in the circumstances and having regard to the degree of benefit enjoyed by the Sub-Concessionaire from such works, on the one hand, and the degree of benefit enjoyed by the Undertaking of the Main Concessionaire and others, on the other hand, provided that nothing contained in this clause shall apply to the costs of the construction or maintenance of dams, evaporation pans, pumping units, installations, pipelines and other works connected therewith.

Payments under this clause shall be made on such dates and in such manner as shall be prescribed by agreement of the parties and, failing agreement, by arbitration in accordance with clause 23 below.

8. The Sub-Concessionaire undertakes with all due diligence to operate its Undertaking for the production of bromine and bromine-compounds.

9. (a) If at any time Government shall, pursuant to clause 13 of the Main Concession, give notice to the Main Concessionaire requesting it to commerce production of a product as provided in that clause and such product shall be bromine or bromine compounds, the Main Concessionaire shall forthwith send a copy of such notice to the Sub-Concessionaire with a written request to inform the Main Concessionaire within three months from the date of receipt of such notice whether the Sub-Concessionaire is prepared to produce such product.

(b) If the Sub-Concessionaire shall wish the Main Concessionaire to exercise the powers vested in it by clause 13 of the Main Concession to object to the notice of Government, it shall within the said period of three months give notice thereof to the Main Concessionaire and present thereto all the reasons and evidence required and desirable for the preparation of the objection.

(c) Notice of the Sub-Concessionaire to the Main Concessionaire under sub-clause (a) of this clause that it is prepared to produce such product, or notice under sub-clause (b) of this clause of its request that the Main Concessionaire shall object to Government notice, shall not be binding upon the Main Concessionaire. The Main Concessionaire, however, shall consider such notice before it gives notice to Government that the Sub-Concessionaire is prepared to produce that product or that the Main Concessionaire objects to the Government notice in accordance with the said clause 13. Moreover, the Main Concessionaire, before giving notice

to Government as aforesaid, shall be entitled to take into account each one of the matters specified in the said clause 13 of the Main Concession, whether they are relevant to or have been raised by the Sub-Concessionaire, or not.

(d) If the Sub-Concessionaire shall give notice that it is prepared to produce the product specified in the Government notice and the Main Concessionaire shall confirm such notice under sub-clause (c) of this clause, it shall forthwith give written notice thereof to the Sub-Concessionaire, and the Sub-Concessionaire shall do everything required as speedily as possible to secure the discharge of the obligations of the Main Concessionaire under clause 13 of the Main Concession, with respect to the said product.

(e) If the Sub-Concessionaire shall within the said period of three months notify the Main Concessionaire that it is not willing to produce such product, or if it shall give no notice of its decision, the Main Concessionaire shall at its discretion, and without prejudicing any other remedy it may have under the Sub-Concession or any law, be entitled to object to the Government notice or accept such notice and produce the said product either by itself or by another Sub-Concessionaire or licencee, or notify Government that it has no objection to Government granting to another person the right to produce such product.

(f) Save as in this clause otherwise provided, the Sub-Concessionaire shall comply with, discharge and observe all the obligations of the Main Concessionaire to Government under the said clause 13 with respect to the production of bromine and bromine compounds, including the obligations of the Main Concessionaire emanating from any arbitration award under the Main-Concession with respect to bromine and bromine compounds and the production thereof.

(g) The Sub-Concessionaire shall cooperate with the Main Concessionaire in the supply of technical assistance, testimonies and reasons before any arbitration between

Government and the Main Concessionaire under the said clause 13 of the Main Concession, with respect to the proposed production of bromine or bromine compounds or any matter deriving therefrom.

10. The Sub-Concessionaire shall be entitled, with the approval of Government and Main Concessionaire, to dispose of any waste products formed in the course of operating the Undertaking, to a suitable place in the reserved lands.

11. In the absence of any other express provision in the Sub-Concession (excepting the obligation of the Main Concessionaire to pay royalties to Government, and to pay rent under the Main-Concession), the Sub-Concessionaire hereby agrees to assume all the obligations of the Main Concessionaire with respect to obtaining bromine and bromine compounds and rendering marketable, selling and disposing of the same, and comply with and observe all the terms of the Main Concession, and to indemnify the Main Concessionaire in respect of any claims, damages and expenses related thereto in any way howsoever.

12. (1) There are excepted and reserved to Government, out of the grants hereinbefore in clause 2 set out -

(a) gold, silver or other precious metals and their ores, precious stones, copper and iron ores, antiquities and petroleum as defined in the Petroleum Law, 5712-1952 (hereinafter collectively referred to as "the Excepted Substances"), in or beneath the Dead Sea, the leased lands or the reserved lands;

(b) the right to enter upon any facilities and property of the Sub-Concessionaire in or beneath the Dead Sea, the leased lands or the reserved lands for the purpose of making any survey or inspection in connection with the matters stated in sub-clause 1(a) of this clause.

(2) The Sub-Concessionaire shall forthwith upon the discovery of any of the excepted substances, give Government

and Main Concessionaire notice of such discovery, and shall permit Government or any person authorized by it to enter upon any place as mentioned in sub-clause (1)(b) for the purpose of exploring for or obtaining the excepted substances, and Main Concessionaire shall pay the Sub-Concessionaire compensation for any damage thereby occasioned to the Sub-Concessionaire, within the limits of the compensation paid to Main Concessionaire by the Government under clause 3 (2) of the Main Concession.

13. The Sub-Concessionaire shall not, without the previous consent in writing of Government and Main Concessionaire, make any contract or arrangement with any person for the restriction of the output of the products of the Sub-Concessionaire or for raising or keeping up prices in such a way as to restrict output. The provisions of this clause shall be in substitution for the Restrictive Trade Practices Law, 5719-1959, which shall not apply to the Sub-Concessionaire with regard to the Sub-Concession.

14. The Sub-Concessionaire shall comply with all laws relating to public health and safety and with such provisions of the Mining Ordinance and the Factories Ordinance, 1947, and Regulations made thereunder as are related to health and safety of workers.

15. (a) The Sub-Concessionaire may request the Main Concessionaire to make an application to the Minister of Finance and the Minister of the Interior to make an order, providing that the Sub-Concessionaire shall during the whole or any part of the period of the Sub-Concession pay to Government a fixed rate to be agreed upon between the Minister of Finance, the Minister of the Interior and the Sub-Concessionaire; such rate shall be in lieu of local rates.

(b) Upon such order coming into operation, no local authority shall be entitled to impose upon or collect from the Sub-Concessionaire any local rates, and the Minister of the Interior will distribute among the local authorities concerned

in such manner and in such proportions as he may from time to time deem fit all the moneys which shall have been received by Government under this Clause in lieu of all the rates which, but for the provisions of this Clause and such order as aforesaid, would have been payable by the Sub-Concessionaire.

(c) Nothing in this clause or in any such order as aforesaid, shall derogate from any relief or exemption from local rates to which the Sub-Concessionaire may at any time be or become entitled to by virtue of the provisions of the Law for the Encouragement of Capital Investments 5719-1959, or any other law, and in making any such order as aforesaid the Minister of Finance and the Minister of the Interior shall give effect to such relief or exemptions as aforesaid.

16. Failure or omission or breach, whether by the Main Concessionaire, or the Sub-Concessionaire, in the observance or performance of any of the stipulations, agreements or conditions in this Sub-Concession contained and on the part of either party to be observed or performed, shall not give rise to any claim or demand by one party against the other party, nor in any manner operate to the prejudice of the other party, or be deemed a breach of this Sub-Concession, if it be reasonably shown that the non-performance or non-observance has arisen from any one or more of the following causes: Act of God, acts of foreign rulers or people, acts of infiltration, war, warlike operations, blockade, embargo, insurrection; rebellion, riots, strikes and lockouts or labour disputes, fire, storm, tempest, explosion, earthquake, floods or other causes beyond the control of the parties.

17. (a) In consideration of all the rights and privileges granted to the Sub-Concessionaire by this Deed of Sub-Concession, except the Sub-leases referred to in Clause 4 above and except the matters referred to in Clauses 6 and 7 above (in respect of which rent will be paid as stated in the said Clauses) the Sub-Concessionaire shall pay to Main Concessionaire commencing

the year beginning 1st April, 1964, and thereafter in each year, a royalty equal to 5% of the value of bromine produced by the Sub-Concessionaire and sold in such year and such value shall be ascertained at the end of each year and shall be the value thereof ex works of Sub-Concessionaire unpacked. Such value shall be determined by taking the sales price (including any benefits to the extent that the same shall be granted) during such year and deducting from such price the following amounts, that is to say -

(I) The proper costs of packing, sales commission and transport and insurance from the works of the Sub-Concessionaire to the place of destination agreed upon with the customer; and

(II) 10% of the amount which shall remain after deducting from the said sales price all the proper costs referred to in paragraph (I) of this sub-clause.

And a royalty equal to 5 per cent, of the value of bromine compounds produced by the Sub-Concessionaire and sold in such year and such value shall be ascertained at the end of each year and shall be the value thereof ex works of Sub-Concessionaire unpacked; such value shall be determined by taking the sales price (including any benefits to the extent that the same shall be granted) during such year and deducting from such price the following amounts, that is to say: -

(I) The proper costs of raw materials (not being mineral salt, minerals and chemicals obtained from the Dead Sea) present in the product sold, plus 15% of such proper costs; and

(II) The proper costs of packing, sales commission and transport and insurance from the works of the Sub-Concessionaire to the place of destination agreed upon with the customer; and

(III) 10% of the amount which shall remain after deducting from the said sales price all proper costs referred to in paragraph (II) of this sub-clause.

(b) If Government shall reduce the royalties payable in respect of bromine compounds under clause 15 of the Main Concession, the royalties payable in respect of the said bromine compounds by the Sub-Concessionaire to the Main Concessionaire shall be reduced and equalized with the reduced royalties as aforesaid.

(c) The amount of the royalties for each year shall be ascertained and certified by an auditor. The sum due shall be paid to the Main Concessionaire by the Sub-Concessionaire within 90 (ninety) days of the expiry of each year in respect of which the royalties are payable.

(d) Royalties payable by the Sub-Concessionaire to the Main Concessionaire under this Deed of Sub-Concession shall, for the purpose of the Income Tax Ordinance, be deemed to be an expense wholly and exclusively incurred in the production of the income of the Sub-Concessionaire.

(e) For the purposes of this Clause, the expression "year" means a year commencing on the 1st day of April, and expiring on the following 31st day of March.

18. (a) The Sub-Concessionaire shall keep at all times at its principal office all usual and proper books of account to be open at all reasonable times for inspection by the representatives of Government and the Main Concessionaire upon notice in advance.

(b) The Sub-Concessionaire shall send to Government and the Main Concessionaire every year a duly audited balance sheet and profit and loss account and a detailed return certified by an auditor, giving all such particulars as shall be required for calculating the royalties payable to the Main Concessionaire in such year in accordance with Clause 17 above.

19. The validity of this Sub-Concession shall expire if the Sub-Concessionaire, without the previous consent of the Main Concessionaire, Government and the approval of the Finance

Committee of the Knesset, shall assign, mortgage, charge or otherwise dispose of the Sub-Concession or any part thereof or grant Sub-Concessions or licences under this Sub-Concession.

20. (a) Notwithstanding all the provisions set out in the Sub-Concession, if the Sub-Concessionaire shall commit a breach of or fail to discharge its obligations to the Main Concessionaire under the Sub-Concession, and shall not remedy such breach or failure within a reasonable time after notice in writing has been given thereto by the Main Concessionaire specifying such breach or failure and requesting the Sub-Concessionaire to remedy same, then, the Main Concessionaire shall, without prejudicing any other right it may have under the Sub-Concession or any law, be entitled at any time by notice in writing to terminate the Sub-Concession and such other rights and privileges given thereunder to the Sub-Concessionaire, and regain possession of all the lands sub-leased thereto under or pursuant to this Sub-Concession.

(b) Notwithstanding any provisions in the Sub-Concession, if an order shall be made or a resolution passed for the winding-up of the Sub-Concessionaire, the validity of the Sub-Concession shall expire, unless Government with approval of the Finance Committee of the Knesset decide otherwise.

21. (a) Upon the expiration of the period of the Sub-Concession otherwise than by the sooner determination of the Sub-Concession under clauses 19, 20 and 26 of the Sub-Concession (hereinafter referred to as "termination date") all fixed tangible assets belonging to the Sub-Concessionaire shall become vested in the Main Concessionaire and the Main Concessionaire shall pay to the Sub-Concessionaire in respect of such fixed tangible assets such amount as shall be received by the Main Concessionaire from Government under clause 24 of the Main Concession as the depreciated replacement value thereof as at the termination date and all other property of any

nature whatsoever belonging to the Sub-Concessionaire at the termination date shall remain the property of the Sub-Concessionaire.

(b) If at the termination date the fixed tangible assets of the Sub-Concessionaire or any part thereof shall be mortgaged or charged, such mortgage or charge shall continue to attach to such assets, but the depreciated replacement value thereof shall not be reduced by reason of such mortgage or charge and the following provision shall apply: -

(I) The Main Concessionaire shall be entitled to withhold from such depreciated replacement value such sum as will be sufficient to repay the principal and interest secured by such mortgage or charge as and when the same shall become due, or a sum equal to the depreciated replacement value of the asset, whichever is the lower sum;

(II) In the event that the Main Concessionaire shall withhold such sum as aforesaid, it shall either itself or agree that Government shall apply the same in repaying the principal and interest secured by the mortgage or charge or to the extent that Government shall indemnify the Main Concessionaire under clause 24(a)(II) of the Main Concession, the Main Concessionaire shall indemnify the Sub-Concessionaire within the limits of the sum given by Government, against all claims and demands by the mortgagee or chargee in respect of such principal or interest as aforesaid; and the balance of the amount of indemnity paid to the Main Concessionaire by Government in respect of the fixed tangible assets of the Sub-Concessionaire shall be repaid to the Sub-Concessionaire.

(c) The Sub-Concessionaire shall not, without the prior written consent of Government and the Main Concessionaire during the ten years preceding the date of the expiration of the Sub-Concession, make any new capital investment in the Undertaking, unless such investment can be amortized in entirety during the said period of ten years in accordance with the Income Tax Ordinance, PROVIDED THAT the consent of

Government and the Main Concessionaire, to any basic investment which may be essential for the proper operation of the Undertaking of the Sub-Concessionaire shall not be unreasonably withheld or delayed.

The withholding or delaying of the said consent due to Government's refusal to consent or Government not granting its consent to the investment at the instructions of the Main Concessionaire, shall not be regarded as a breach of this clause and shall not constitute any cause of action by the Sub-Concessionaire against the Main Concessionaire.

22. (a) Upon the sooner determination of the Sub-Concession by the Main Concessionaire pursuant to clause 20(a) above and upon the expiration thereof under clause 19, 20(b) or 26 of the Sub-Concession (hereinafter referred to as 'the Expiration Date'), the Main Concessionaire shall regain possession of all the lands leased to the Sub-Concessionaire under or pursuant to the Sub-Concession, and all fixed tangible assets belonging to the Sub-Concessionaire shall become vested in the Main Concessionaire, and the Main Concessionaire shall pay to the Sub-Concessionaire in respect of such fixed tangible assets, upon such dates, in such manner and subject to such reservations as are hereinafter provided, the depreciated replacement value thereof, and all other property of any nature whatsoever belonging to the Sub-Concessionaire at the expiration date shall remain the property of the Sub-Concessionaire.

(b) The amount of tine depreciated replacement value payable by the Main Concessionaire to the Sub-Concessionaire under this clause shall be paid in 10 (ten) yearly equal installments, commencing six months after the expiration date, and thereafter in each year on the anniversary date of the payment of the first installment.

(c) If at the expiration date the fixed tangible assets of the Sub-Concessionaire or any part thereof shall be mortgaged or charged, such mortgage or charge shall continue to attach to

such assets, but the depreciated replacement value thereof shall not be reduced by reason of such mortgage or charge and the following provisions shall apply: -

(I) The Main Concessionaire shall be entitled to withhold from such depreciated replacement value such sum as will be sufficient to repay the principal and interest secured by such mortgage or charge as and when the same shall become due, or a sum equal to the depreciated replacement value of the asset, whichever is the lower sum;

(II) In the event that the Main Concessionaire shall withhold such sum as aforesaid, it shall apply the same in repaying the principal and interest secured by the mortgage or charge or, if it deems fit, indemnify the Sub-Concessionaire within the limits of the amount withheld as aforesaid, against all claims and demands by the mortgagee or chargee in respect of such principal or interest as aforesaid; and the balance of the amount so withheld by the Main Concessionaire in respect of the fixed tangible assets of the Sub-Concessionaire shall be repaid to the Sub-Concessionaire in such installments, upon such dates and in such manner as in sub-clause (b) of this clause provided.

23. If at any time within the period of the Sub-Concession or thereafter, any doubt or dispute shall arise between the parties concerning the interpretation or execution of the Sub-Concession or anything connected therewith or concerning the rights and liabilities of the parties thereto, the same shall, failing any agreement to settle the doubt or dispute by other means and without taking into account whether or not there are any express provisions for the reference of the matter to arbitration under any other Clause of the Sub-Concession, be referred to the arbitration of two persons, to be appointed respectively by each party to the reference. The place of the arbitration shall be such as will be agreed between the parties and failing agreement shall be Jerusalem.

The provisions of the Arbitration Ordinance shall apply to the said arbitration.

Nothing in this Clause shall relieve the parties hereto from the necessity of obtaining the approval of the Finance Committee of the Knesset in matters in which such approval is required under the terms of the Sub-Concession.

24. The Sub-Concession shall not derogate from the duties of the Main Concessionaire to Government under the Main Concession or confer upon the Sub-Concessionaire any rights not conferred upon the Main Concessionaire under the Main Concession or relieve the parties hereto from the necessity of obtaining the approval of the Finance Committee of the Knesset in matters in which such approval is required under the terms of the Main Concession or the Sub-Concession.

25. Nothing herein provided shall be construed as conferring upon the Sub- Concessionaire the right to obtain mineral salts, minerals and chemicals from the Dead Sea, the leased lands or the reserved lands except for the purpose of producing bromine or bromine compounds, or shall adversely affect or restrict in any form whatsoever the rights of the Main Concessionaire under the Main Concession to obtain mineral salts, minerals and chemicals from the Dead Sea, the leased lands or the reserved lands for any purpose approved under the Main Concession other than the production of bromine or bromine compounds.

26. (a) The Main Concessionaire: -

(1) shall not transfer more than 49% of the issued share capital of the company holding the Sub-Concession, owned thereby.

(2) shall not transfer more than 49% of its voting rights in the company holding the Sub-Concession;

(3) shall not waive the right to appoint the majority of the board of directors of the company holding the Sub-Concession.

(b) If the Main Concessionaire shall be in breach of any one of the provisions of sub-clause (a) above, the validity of the Sub-Concession shall expire, unless such breach is effected with the prior consent of Government and the approval of the Finance Committee of the Knesset.

27. The Sub-Concession shall be binding upon the parties hereto and their assigns and substitutes.

28. (a) The receipt by the Main Concessionaire of any royalties, rent or other amount payable under the Sub-Concession shall not be deemed to imply a waiver by the Main Concessionaire of any of its rights in respect of any antecedent breach of any of the provisions of the Sub-Concession.

(b) No waiver by any party of any breach of any provision of the Sub-Concession shall be deemed to be a waiver of any subsequent breach of that provision or any other provision, whether of the same or of a different nature.

29. Whenever any notices, consents, applications, requests or communications (hereinafter called 'notices') are to be given under the Sub-Concession, the notices shall be in writing and shall be deemed to be duly given if mailed by prepaid registered post to the parties at the following addresses:

The Main Concessionaire at: Potash House, Beersheba.

The Sub-Concessionaire at: Potash House, Beersheba.

or to such other address within the State of Israel as any of the parties may designate by a similar notice to the other.

Any notice to be sent shall be deemed to have been served at the expiration of seventy-two hours from the posting of the letter containing such notice duly addressed.

30. The parties hereto hereby waive and agree to dispense with the necessity of any notarial notice in respect of any breach or default of any of the terms hereof.

31. The parties hereto agree that anything under this Sub-Concession permitted to be done or exercised by Government and any consent to be given by Government under the Sub-Concession, shall be properly done, exercised or given, if done, exercised or given by any person appointed by Government in that behalf.

IN WITNESS whereof the parties hereto have hereunto set their hands and seals on the day and year first hereinbefore mentioned.

For and on behalf of
MIFALEI YAM HAMELAH B.M.

For and on behalf of
DEAD SEA BROMINE COMPANY LTD.

GOVERNMENT COMPANIES LAW

5735-1975

UPDATER TO THE SECOND EDITION

September 1994

The Government Companies (Amendment No. 8) Law 5744-1994 was passed on July 26, 1994, and published in *Sefer Ha-Chukkim* 1476, of August 4, 1994, p. 268. It introduces certain changes in sections 16A(1), 24(c) and 37(c).

The following three pages are intended to incorporate those provisions in our second edition of the translation of this Law. Please follow the instructions at the head of each page.

Arych Greenfield - A.G. Publications

INTRODUCTION

We here present a completely updated and consolidated English translation of the Government Companies Law 5735-1975, incorporating all amendments, up to and including Amendment No. 7. The more recent changes are of major current importance: they make provisions that govern the process of privatization of government owned bodies corporate.

As a rule, we base our work on *Laws of the State of Israel* (LSI), a series of yearbooks published by the Ministry of Justice. That series, however, is far from being up-to-date, and most of the amendments to the present Law are not yet available from that source. Large sections of the present text consequently were translated from the Hebrew original by Arych Greenfield, who also consolidated and edited the entire publication.

In order to keep costs within reason, we have used photostatic reproductions of those parts of the Law, which are

available in LSI. Because of that, type faces and format are not uniform throughout these pages; section headings, for instance, appear either as marginal notes or in bold type subtitles. However, we believe that this will not cause any difficulty, and that the translated text here presented is clear and will be useful.

Although great efforts have been exerted to assure the correctness, completeness and relevance of this English version, the translator, editor, publishers and distributors have made no warranty and can assume no responsibility whatsoever on that account.

Readers are also cautioned that no translation of Israel legal measures has any standing under Israel legal practice, the courts and other authorities will concern themselves only with the original and official Hebrew text. For this and other reasons readers are advised to consult qualified professional counsel before making any decision in connection with the Regulations, which are here presented in translation for their general information only.

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GOVERNMENT COMPANIES
LAW 5735-1975

Definitions

1. (a) In this Law —

"Government company" - a company in which more than half the voting power at general meetings or the right to appoint more than half the Directors is held by the State or by the State together with a Government company or with a Government subsidiary company;

"Government subsidiary company" - a company in which more than half the voting power at general meetings or the right to appoint more than half the Directors is held by a Government company, a Government subsidiary company, or a Government company together with a Government subsidiary company;

"mixed company" - a company other than a Government company, in which half or less than half the voting power at general meetings or the right to appoint half or less than half the Directors is held by the State;

"company wholly owned by the Government" - a company, all the shares of which are owned by any of these: the State, a company all the shares of which are owned by the State; the State together with an aforesaid company, the State or an aforesaid company together with a local authority;

"appointment of Director" includes election or designation in any other manner;

"the Ministers" - the Minister of Finance, together with the Minister designated by Law as responsible for the affairs of the company;

"Committee" - the Knesset Finance Committee;

"Appointments Review Committee" - the committee set up under section 18B;

"Authority" - the Government Companies Authority, established by Law;

"basic documents" - memorandum and by-laws of a company;

"privatization" - acts, the objective of which - all at once or gradually - is one of the following:

(1) the elimination or reduction of the Government's part in the right to vote at general meetings of the company or of the right to appoint Directors in the company, or the elimination or reduction of any other Government involvement in the company, all if that contributes to conversion of a Government company to a mixed company, or to the conversion of the company into a company to which this Law does not apply, or to some other substantive change in the balance of power between members in the company, or to give the public or a new member in the company 10% or more of the voting rights in the company or the right to appoint a Director;

(2) the reduction - by 10% or more - of the government's part in the company's share capital;

(3) the substantial reduction of the company's activity, by a transfer of business and assets to others;

"Cabinet Committee" - Cabinet Committee Privatization said in section 59A;

"decision on privatization" - a decision under section 59B;

"company that undergoes privatization" - a company, in respect of which the Cabinet Committee has adopted a decision on privatization;

"Companies Ordinance" - the Companies Ordinance (New Version) 5743-1983;

Applicability of Companies Ordinance

2. Subject to the provisions of this Law, the Companies Ordinance shall apply to Government company, and the terms in this law shall have the meaning assigned to the same terms in the Companies Ordinance.

Overriding effect of this Law.

3. The basic documents cannot derogate from the provisions of this Law

Guidelines for Government company.

4. (a) A Government company shall act in accordance with the business considerations by which a non-Government company is normally guided, unless the Government, with the approval of the Committee, prescribes other considerations for acting. This provision shall not apply to a Government company the basic documents of which prohibit the distribution of profits.

(b) Where one of the objects of a Government company is to provide the public with commodities or services on a non-profit basis, the Government may decide that in pursuit of this object the company shall act in accordance with rules binding upon a person who carries out a public function under any law.

CHAPTER TWO: ESTABLISHMENT OF GOVERNMENT COMPANY AND CONVERSION OF COMPANY INTO GOVERNMENT COMPANY

Establishment of Government company.

5. (a) The establishment of a Government company requires a decision of the Government. The decision shall be taken upon the proposal of a Minister submitted to the Government together with an opinion form the Authority.

(b) Where the Government has decided to establish a Government company, the Minister of Finance shall bring the

decision to the knowledge of the Committee, indicating the sources from which investments in the company are to be financed and attaching the Authority's opinion.

(c) The Government shall prescribe rules for its examination of proposals for the establishment of Government companies and directives for the drawing up of the Authority's opinions. Such rules and directives shall be published in *Reshumor*.

Subjects to be dealt with in the Government's decision.

6. In a decision to establish a Government company, the Government shall determine, *inter alia* --

(1) the objects of the company, the structure of its share capital and the rights attached to different classes of shares;

(2) the total number of directors and the number of directors on behalf of the State;

(3) the Minister responsible for the affairs of the company.

Registration of company.

7. A company the basic documents of which show it to be a Government company shall not be registered unless a certificate by the Authority has been submitted to the Registrar of Companies attesting that the Government has decided to establish the company and that the basic documents conform with the Government's decision. Where a certificate as aforesaid has been submitted, the Registrar shall classify the company as a Government company.

Conversion of company into Government company.

8. (a) A transaction by the State as a result of which a non-Government company becomes a Government company requires a decision of the Government, and sections 5 and 6 shall apply *mutatis mutandis*.

(b) Where rights in a non-Government company which are capable of converting it into a Government company are

obtained by the Government otherwise than by way of a transaction, such company shall become a Government company after six months unless within that time the Government decides that the State shall waive or transfer those rights. In the absence of such a decision, the Government shall, within those six months, determine the particulars referred to in section 6, and the Minister of Finance shall bring them to the knowledge of the Committee.

(c) Where a non-Government company has become a Government company, the Authority shall submit to the registrar of Companies a certificate attesting such fact, indicating the Minister responsible for the affairs of the company.

Purchase of minority shares.

9. (a) Where a company has become a Government company under section 8, the State shall purchase the shares of the other shareholders who so desire, except redeemable preference shares.

(b) Within one month after a company becomes a Government company, the Authority shall notify the shareholders concerned of their right under this section, in the manner prescribed in the basic documents of the company for the giving of notice, and within three months after receipt of the notification a shareholder may notify the Authority that he desires the State to purchase all or part of his shares. The Ministers may extend the times with the approval of the Committee.

(c) The price of the shares shall be their value immediately before the company became a Government company. In the absence of agreement between the parties, such value shall be determined by a person appointed in that behalf by the President of the District Court of Jerusalem, and the Authority shall notify his determination to the shareholder. The price

shall, unless otherwise agreed upon, be paid upon the transfer of the shares to the State.

(d) Within fourteen days after the Authority has notified him of the determination of the value of his shares under subsection (c), a shareholder may withdraw his notification under subsection (b).

(e) The provisions of this section shall also apply, mutatis mutandis, where the Government has decided as specified in section 4(a) or 15.

Investments in Government company.

10. The Government shall make no investment in a Government company save with the approval of the Committee.

Decisions requiring Government approval.

11. (a) Decisions of a Government company in the following matters require the approval of the Government:

(1) a change in the objects of the company;

(2) an increase of the registered share capital;

(3) a change in the rights attached to the shares;

(4) an allotment of shares of the company, or consent to a transfer of shares where consent is required under the basic documents, if such an allotment or transfer will materially change the balance of power between members of the company or confer upon a new member 10 per cent or more of the nominal value of the share capital or of the voting power in the company or the right to appoint a director.

(5) the issue of redeemable preference shares;

(6) the issue of debentures convertible into shares and the conversion into shares of debentures issued without conversion rights or of a loan received by the company;

(7) the conversion of the company from a non-private company into a private company or vice versa;

(8) a reorganization or voluntary winding-up of the company, a compromise, an arrangement or amalgamation with another company;

(9) the establishment of a company, alone or with others, and the acquisition of shares in an existing company, except the acquisition of shares on the stock exchange by a company the ordinary business of which includes acquisition as aforesaid;

(10) an act as shareholder in a Government subsidiary company with respect to one of the matters referred to in paragraphs (1) to (9);

(11) an undertaking to effect one of the acts referred to in paragraphs (1) to (10).

(b) Government approval under subsection (a) shall be decided upon on a proposal of the Ministers, submitted to the Government with the opinion of the Authority. The Minister of Finance shall bring the Government's decision to the knowledge of the Committee. The provisions of section 5(c) shall also apply to approval under this section.

(c) Where the Government has approved a decision on any of the matters referred to in subsection (a), the Authority shall give the company a certificate to such effect. A copy of the certificate shall be submitted to the Registrar of Companies.

(d) Where a decision on any of the matters referred to in subsection (a) requires registration under the Companies Ordinance, the Registrar of Companies shall not register it unless a copy of the said certificate has been submitted to him.

Company ceasing to be Government company.

12. Where a Government company has become a non-Government company, the Authority shall submit a certificate to such effect to the Registrar of Companies.

Certificates of the Authority and appeal.

13. (a) A certificate of the Authority under section 7, 8, 11 or 12 shall be *prima facie* evidence of what is stated therein.

(b) A person who considers himself aggrieved by a certificate of the Authority under section 8 or 12 and who alleges that the company has not become a Government company or that the Government company has not become a non-Government company, as the case may be, may appeal to the District Court of Jerusalem. The period of appeal and the appeal procedure shall be prescribed by the Minister of Justice by regulations.

Winding-up of Government company.

14. (a) The Government may bring about the voluntary winding-up of a Government company or the sale of shares held in it by the State if one of the following appears to it to be the case:

(1) the objects of the company have been achieved or cannot be achieved or cannot be achieved economically or efficiently;

(2) the objects of the company have been assigned to a statutory authority or another Government company.

in subsection (a) - a Government company should be wound up or that shares held by the State should be sold, and if no Minister proposes that to the Government, then the Authority shall express its opinion in a reasoned memorandum to the Minister of Finance and to the Government.

Amalgamation of Government companies

15. (a) The Government may amalgamate two or more Government companies, if it appears that their objectives essentially coincide or complement each other, or that they may be attained more economically or more efficiently by a single company.

(b) The provisions of section 14(b) and (c) shall also apply, *mutatis mutandis*, to this section.

Sale of shares of Government subsidiary company

15A. (a) A decision by a Government company to sell the shares it holds in its Government subsidiary company is subject to ratification by the Government and the Committee.

(b) The Government's decision of approval under subsection (a) shall be reached in accordance with a proposal by the Ministers, submitted to the Government together with the Authority's opinion.

(c) The provisions of this section shall not apply to sales on an exchange of shares there registered for trading, if the total of shares sold on an exchange in one balance sheet year does not exceed 5% of the nominal value of the subsidiary company's issued and paid up shares, and if the total consideration in one balance sheet year does not exceed NS10 million, provided the sale does not convert a Government subsidiary company into a company that is not a Government subsidiary company.

(d) The amount said in subsection (c) shall be changed on April 1 of each year, beginning with fiscal year 1990, at the rate of increase of the consumer prior index from the index published for February 1989 to the index last published before the day of the change.

Chapter Three: DIRECTORS

Definition

16. In this chapter, "Director" - a Director on behalf of the State in a Government company.

Qualifications

16A. An Israel resident who has at least reached age 25, and for whom one of the following holds true, is qualified to serve as Director of a Government company.

(1) he holds an academic degree in one of the following subjects: economics, business administration, law, auditing, public administration, engineering or labor studies, or he holds an academic degree or completed other university level studies, all in the field of the company's major activity; (2) he has at least five years experience in one of the following, or has an aggregate of five years experience in two or more of the of following:

(a) in a ranking business management position of a body corporate with a significant volume of business;

(b) in a ranking public office or in a ranking position in the public service on economic, commercial, administrative or legal subjects;

(c) in a ranking position in the field of the company's major activity.

Restrictions

17. (a) The following are not qualified to be Directors:

(1) a Minister, a Deputy Minister and a Knesset member;

(2) an employee of the company and a person engaged in its service, except the general manager and an elected representative of the company's employees; for this purpose, the chairman of the company's Board of Directors shall not be deemed a company employee;

(3) a member of the public, whose other business may create conflicts of interest with his tasks as Director of the company;

(4) the Director and employees of the Authority, except if the company is in the process of winding up or of liquidating its business;

(5) a person convicted of an offense which - in the Attorney General's opnion - involves moral turpitude or would have required him not to be appointed;

(6) a person disqualified from serving as Director of a company under the Companies Ordinance (New Version) 5743-1983, or under any other enactment.

(b) No person shall be Director of more than two companies, except in cases prescribed by the Minister of Finance by regulations, in consultant with the Authority and with the Committee's approval.

(c) The Minister of Finance may - in consultation with the Authority and with approval by the Committee - prescribe by regulations

(1) repealed

(2) how many directors shall be members of the public and how many State employees;

(3) rules under which an elected representative of the company's employees shall be appointed Director, and the kinds of companies in which such a Director shall serve.

(d) The number of Directors who are State employees shall not exceed two thirds of the total number of Directors appointed as representatives of the Government.

Disqualification because of economic links

17A. (a) Without derogating from the generality of the provisions of section 17(a)(3), no person shall be appointed Director - whether from among the general public or from among Government employees - if he has any economic link with the company or with a body corporate connected with the company, or if he has any personal link with the management of the company or of a body corporate connected with the company.

(b) For purposes of this subsection -

"economic link with the company or with a body corporate connected with the company" - the direct possession

of one percent - or of a significant quantity that is less than that - of securities of the company or of a body corporate connected with the company, or the right to appoint a Director in the company or in a body corporate connected with the company;

"body corporate connected with the company" - a body corporate that holds 50% or more of the nominal value of the company's issued capital or of voting rights in it, or that may appoint half or more of the Directors or its general manager, and also a body corporate in which the company holds aforesaid rights;

"personal link with the management" of the company or of a body corporate connected with the company also exists when a person is a relative of a Director or of the general manager or of a ranking employee of the company or of a body corporate connected with the company, for this purpose, "relative" - spouse, sibling, parent, offspring, spouse's offspring and the spouse of each of these.

Appointment

18. (a) A Director shall be appointed by the Ministers after consultation with the Appointments Review Committee. If the Appointments Review Committee decides not to recommend appointment of a candidate to whom the provisions of section 18C(a) apply, the Minister may make objection to the decision before the Government plenum; the Committee's reasons shall be presented to the Government by the Attorney General or his representative; if the Government does not accept the Minister's objection, then the candidate shall not be appointed Director.

(b) The letter of appointment shall be delivered to the Director by the Ministers after the opinion of the Appointments Review Committee has bee received, and a copy thereof shall be delivered in the company through the Authority.

(c) The appointment shall be in effect from the date on which the letter of appointment was delivered to the company, unless another date is prescribed therein.

Proper representation of both sexes

18A. (a) The composition of the Board of Directors of a Government company shall give proper expression to the representation of both sexes.

(b) Until such proper expression is reached, the Ministers shall appoint - as far as possible under the circumstances of the case - Directors of the sex which at that time is not properly represented on the company's Board of Directors.

Appointments Review Committee

18B. (a) The Minister of Finance shall appoint an Appointments Review Committee, composed as said below, to review the qualifications and suitability of candidates for the positions of Director, chairman of the Board of Directors or general manager in a Government company:

(1) the chairman of the Committee shall be a representative appointed by the Attorney General, qualified to serve as judge of a District Court, and he shall be from among Government or public service employees, and he may be a person who formerly served as judge or retired from the Government or public service;

(2) a public personality, chosen by the chairman of the Committee from a list - composed for this purpose by the Ministers of Finance and of Justice - of public personalities who meet the qualifications set in this Law for a chairman of a Board of Directors, and who have no personal, business or political link with any Cabinet member;

(3) a representative of the Government Companies Authority.

(b) The quorum for meetings of the Committee shall be the chairman and an additional member; in case of a tie vote, the chairman shall have the casting vote; the Committee shall set its own procedures, as far as they are not prescribed by this Law.

(c) The following are the Committee's responsibilities:

(1) to examine whether a candidate for the position of Director, chairman of a Board of Directors or general manager meets the qualifications said in sections 16A, 24(c) or 37(c),

as the case may be, and if he is not disqualified under the term of sections 17 and 17A:

(2) to determine where it is appropriate to appoint him in accordance with the provisions of section 18C;

(3) to advise the Ministers on the degree of a candidate's suitability for a position, also taking into account the company's special needs, its size and the composition of the Board of Directors at the time of the appointment, and taking into consideration the candidate's ability to devote the time necessary to the position for which he is being considered;

(4) the Committee shall communicate its opinions on the matters said in paragraphs (1) to (3) to the Ministers in writing;

(5) in order to perform its tasks under this Law, the committee may require written particulars about the candidate, his history, education and occupation, and it may also require information or an opinion from the Authority.

Special qualifications

18C. (a) If the Appointments Review Committee finds that a candidate for the position of Director, chairman of the Board of Directors or general manager in a Government company has a personal, business or political link with any Cabinet member, then it shall not recommend his appointment unless it finds that he has special qualifications in the company's field of activity, or that be has some other special qualification, in addition to the qualifications required under this Law for that position.

(b) For purposes of this Law, mere membership in a political party shall not be deemed a personal or political link.

(c) The provisions of section 16A shall not apply to an elected representative of the company's employees who is appointed Director, provided he reached age 25 by the day on which he is appointed.

Remuneration and expenses

19. The Ministers of Finance may, in consultation with the Authority and with approval by the Committee, make

regulations on the remuneration and expenses payable to a Director.

Obligation to give information

20. (a) Notwithstanding any other Law, a Director shall - when requested - give the Ministers and the Authority information on the affairs of the company and on his activities in it.

(b) If a Director becomes aware of anything in the company, which *prime facie* indicates the violation of any Law or of moral standards, he shall being the matter without delay to the attention of the chairman of the Board of Directors, the Ministers, the Authority and the State Comptroller.

Term of tenure

21. A Director shall be appointed for a term of not more than three years from the day on which his appointment went into effect. A Director who has ceased to hold office may be reappointed.

Termination of tenure

22. (a) A Director shall cease to hold office before the end of the term for which he was appointed, if -

(1) he resigned by delivering a letter of resignation to the Ministers; the Ministers may delay the effect of the resignation by not more than one month;

(2) he was absent from four consecutive meetings of the Board of Directors or from six meetings in one year, unless the Ministers - after consultation with the Authority - declared by notice to the company that the absence was justified;

(3) he is unable to perform his tasks and the Ministers - after consultation with the Authority - so notified the company;

(4) he was convicted of an offense which - in the Attorney General's ability to comply with a lawful instruction or request under sections 59D or 59E; the Authority shall inform the company of this matter.

(b) If a Director was appointed while he was a State employee or an employee of another Government company, and if he ceases to be an employee as aforesaid, then he shall cease to hold office on the day on which the Authority so notifies the company, but the Ministers - after consultation with Authority - may reconfirm his appointment.

(c) When the Government has sold shares it held in a Government company, then some or all of the Directors shall cease to hold their positions from the day announced by the Authority to the Company, if that is required by the sale transaction; if the sale transaction requires that only some of the Directors cease to hold their office, then the Ministers shall decide - after consultation with Appointments Review Committee - which of the Director shall cease to hold office.

Suspension

23. If a Director is suspected of an offense which - in the Attorney General's opinion - involves moral turpitude, then the Ministers may suspend him by notice to the company, and they may appoint a substitute for him for the period of his suspension.

Filling the quorum

23A. If the number of members of a Board of Directors entitled in participate in its meetings drops to fewer than its quorum and this situation continues for more than 30 days, or if the number of members drops to fewer than the minimum number set by the company's by-laws and this situation continues for more than 60 days, then the Government may - after consultation with the Appointments Review Committee - appoint one or more Directors, in the number required to reach the quorum.

Chapter Four: BOARD OF DIRECTORS

Article One: Chairman of the Board of Directors

Election

24. (a) The Board of Directors of a Director company shall elect one of its members to be its chairman; the election requires approval by the Ministers, after consultation with the Appointments Review Committee; however, the Government may, after consultation with the Appointments Review Committee, appoint the chairman of the Board of Directors from among its members, if it deems it necessary to do so.

(b) The general manager of a company shall not be the chairman of its Board of Directors.

(c) A person shall be qualified to serve as chairman of the Board of Directors of a Government company if he meets the provisions of section 16A, provided be meets the conditions in paragraph (1) and also one of the conditions of paragraph (2) of that same section; however, in exceptional cases it is permissible to choose a person who does not meet the condition set in paragraph (1) of that section, if has at least twelve years experience in posts said in paragraph (2) of that section, at least six years of that in bodies with a scale of activity no smaller than that of the body in which he is to be appointed, and if the Appointments Review Committee certified that there are special reasons for the aforesaid choice.

(d) When a Board of Directors of a Government company has chosen a person to be chairman of the Board of Directors, but the Appointments Review Committee decided not to recommend his appointment because the provisions of section 18(a) apply to him, then the Minister shall not approve the appointment, unless he objected to the decision and his objection was approved by the Government plenum; the provisions of section 18(a) shall apply to the said objection.

CHAPTER FOUR: BOARD OF DIRECTORS

Article One: Chairman of the Board of Directors

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(b) The general manager of a company shall not be the chairman of its Board of Directors.

(c)A person shall be qualified to serve as chairman of the Board of Directors of a Government company if he meets the provisions of section 16A, provided he meets the conditions in paragraph (1) and also one of the conditions of paragraph (2) of that same section.

(d) When a Board of Directors of a Government company has chosen a person to be chairman of the Board of Directors, and the Appointments Review Committee decided not to recommend his appointment because the provisions of section 18C(a) apply to him, then the Minister shall not approve the appointment, unless he objected to the decision and his objection was approved by the Government plenum; the provisions of section 18(a) shall apply to the said objection.

Obligation to make report

25. Notwithstanding any other Law, the chairman of the Board of Directors shall deliver to the Ministers and to the Authority - once in six months and at any time requested - a written report on the company's activity and on the work of its Board of Directors.

Article Two: Work of the Board of Directors

Times of meetings.

26. (a) Meetings of the board of directors of a Government company shall take place according to the requirements of the company but at least once in two months, unless the Ministers, after consultation with the Authority, prescribe other times according to the nature of the company's business.

(b) The board of directors shall hold a special meeting if the Ministers, the Authority or a director so request or requests. The meeting shall be held within seven days from the date of the request unless it has been requested that it be held within a shorter time. The meeting shall deal with the matters specified in the request and its decisions shall forthwith be brought to the knowledge of the Ministers and the Authority.

Convening and agenda of meeting.

27. (a) The chairman of the board of directors shall convene meetings of the board and shall, subject to the provisions of section 26, prescribe the time, place and agenda thereof.

(b) Invitations to meetings of the board of directors shall also be delivered to the Authority. The Authority may send to each meeting a representative, who may take part in the meeting and whose status thereat shall be that of a director, except that he shall not be counted in the quorum and shall have no voting rights.

Quorum and majority.

28. Unless otherwise provided in the basis documents of the company, a quorum at meetings of the board of directors shall be a majority of the members thereof including at least one director on behalf of the State, decisions shall be passed by a majority of the votes of those taking part in the voting, and in the event of an equality of votes the chairman shall have a casting vote.

Committees.

29. (a) The board of directors may set up from among its members permanent and *ad hoc* committees.

(b) The provisions of section 27(b) shall also apply to meetings of a committee.

(c) The summings-up of a committee shall be regarded as recommendations to the board of directors, which may adopt, vary or reject them.

Audit committee

29A. (a) The Board of Directors shall appoint an audit committee of no fewer than three from among its members.

(b) Notwithstanding the provisions of section 29(c), the effect of the audit committee's decisions on matters enumerated in Chapter Four "A" of the Companies Ordinance (New Version) 5743-1983 shall be as is prescribed there.

Delegation of powers

30. (a) The Board of Directors may delegate any of its powers to one or more of its members or to a committee of its members or to the general manager, except for the power under section 32 and a power in respect.

(2) request—from the auditor and the internal auditor of a company or its subsidiary—a report on that company.

(b) Copies of a report delivered to the Board of Directors under subsection (a)(2) shall be delivered to the general manager and the Authority.

Chapter Five: GENERAL MANAGER

Appointment

37. (a) The Board of Directors of a Government company shall appoint the general manager; the appointment shall require approval by the Ministers after consultation with the Appointments Review Committee; however, the Government may appoint a general manager, if it deems it necessary to do so.

(b) A Minister, Deputy Minister or Knesset member shall not be the general manager of a Government company.

(c) A person shall be qualified to serve as general manager of a Government company if he meets the provisions of section 16A, provided he meets the conditions in paragraph (1) and also one of the conditions of paragraph (2) of that section, and provided the provisions of section 17(a), paragraphs (1), (3), (5) and (6) do not hold for him; however, in exceptional cases it is permissible to choose a person who does not meet the condition set in paragraph (1) of that section, if he has at least twelve years experience in posts said in paragraph (2) of that section, at least six of that in bodies with a scale of activity no smaller than that of the body in which he is to be appointed, and if the Appointments Review Committee certified that there are special reasons for the said choice.

(d) If the Board of Directors of a Government company chose a person to be general manager, but the Appointments Review Committee decided not to recommend his appointment because the provisions of section 13C(a) apply to him, then the Minister shall not approve the appointment, unless he made objection against the decision and it was approved by the Government plenum; the provisions of section 13(a) shall apply to the said objection.

Property declaration

38. A person who has been appointed general manager of a Government company shall, at a time and in a manner and form prescribed by regulations, declare the assets, liabilities and sources of income of himself, of his spouse who lives with him and of his children whom he supports. He shall also declare, as aforesaid, any material changes in these data.

Functions

39. The general manager is responsible for the day-to-day conduct of the affairs of the company within the framework of the budget and plans adopted under section 32(a)(2) and of the decisions of the Board of Directors.

Powers

40. (a) The general manager shall have all the powers that may be conferred on a manager under the Companies Ordinance and under the basic documents of the company, except the powers vested by this law in the Board of Directors or in any other authority.

(b) The general meeting may limit or restrict the powers of the general manager, and so may the Board of Directors. A decision to do so shall be submitted to the Registrar of Companies and the Authority.

Duty to Report

41. (a) The general manager shall, without delay, inform the chairman of the Board of Directors of any material matter of the company, which concerns the functions of the Board of Directors. If the matter exceeds, or is likely to exceed, what has been determined by the Board of Directors under section 32(a) or if it is one of the matters enumerated in section 35, then the chairman of the Board of Directors shall without delay convene a meeting thereof and of the financial reports, consider each item in respect of which the auditor has expressed a reservation, made an observation or refrained from expressing an opinion;

(7) approve the grant of loans and deposit of moneys which deviate from the ordinary course of the company's business:

(8) consider any matter which the Minister or the Authority have or has requested to be put on the agenda or of which the general manager has given notice under section 41:

(b) The Minister of Finance may, on the recommendation of the Authority, prescribe rules for the drawing up of the budgets and plans referred to in subsection (a) (2) either for Government companies generally or for particular categories thereof.

Financial reports.

33. (a) The board of directors shall each year see to the drawing up of the following reports:

(1) a balance sheet;

(2) a profit-and-loss account, including the purposes to which profits are to be applied:

(3) a report of the company's resources and the manner of their use;

(4) in the case of a company which has a subsidiary company - consolidated financial reports unless, in the opinion of the board of directors and the Authority, the character of the activities of the companies or the date of the drawing up of their financial reports does not permit the same.

(b) The Minister of Finance may require a Government company to draw up an additional financial report and may prescribe a date for its submission.

(c) A decision of the board of directors as to the application of the profits of the company shall require the approval of the Authority. Where the Authority objects to the decision of the board of directors, the issue shall be referred to the Minister for determination, and if a decision on privatization was adopted in respect of the company, then the disagreement shall be brought before the Minister of Finance for decision.

(d) The provisions of this section shall not derogate from the provisions of any other law as to the drawing up of financial or other reports.

Submission of documents.

34. (a) The chairman of the board of directors shall submit to the Ministers and the Authority -

(1) drafts of the budget and plans referred to in section 32(a)(2), and drafts of the reports referred to in section 33(a), one month before the date for consideration thereof unless the Ministers, in consultation with the Authority, have prescribed a shorter period;

(2) the documents referred to in paragraph (1), immediately after the board of directors has approved them;

(3) a copy of the minutes of meetings of the board of directors, within two weeks from the meeting concerned.

(b) The documents referred to in subsection (a) shall also be submitted to the State Comptroller, as well as to the

Committee at its request.

(c) The Ministers may direct in respect of a particular Government company that any of the documents referred to in subsection (a) shall be kept as they may direct and shall only be delivered to persons indicated in their direction, and the Minister of Defence may so direct if he considers that reasons of State security so require; a direction under this subsection shall not derogate from the provision of subsection (b).

Duty to notify and restriction on decisions.

35. (a) Where the chairman of the board of directors becomes aware of any matter of the company which, *prima facie*, an infringement of any law or of moral standards or any other similar defect, he shall without delay bring such matter to the knowledge of the Ministers, the State Comptroller and the Authority, unless they have been notified thereof under section 20(b), and shall without delay convene a meeting of the board of directors for deliberation and the determination of modes of action; but the board of directors shall not decide upon the matter before the said authorities have been given a period of fourteen days to express their opinion.

(b) The provisions of this section shall not derogate from a duty of notification under any other law.

Obtaining information.

36. (a) The board of directors may, whenever it deems it necessary -

(1) request of the general manager of a subsidiary of the company information as to any matter which in its opinion relates to the affairs of the subsidiary company;

(2) request of the auditor and the internal controller of a company or of a subsidiary thereof a report as to that company.

(b) Copies of a report delivered to the board of directors under subsection (a)(2) shall be delivered to the general manager and the Authority.

Chapter Five: GENERAL MANAGER

Appointment

37. (a) The Board of Directors of a Government company shall appoint the general manager; the appointment shall require approval by the Ministers after consultation with the Appointments Review Committee; however, the Government may appoint a general manager, if it deems it necessary to do so.

(b) A Minister, Deputy Minister or Knesset member shall not be the general manager of a Government company.

(c) A person shall be qualified to serve as general manager of a Government company if he meets the provisions of section 16A, provided he meets the conditions in paragraph (1) and also one of the conditions of paragraph (2) of that section, and provided the provisions of section 17(a), paragraphs (1), (3), (5) and (6) do not hold for him.

(d) When a Board of Directors of a Government company has chosen a person to be general manager, and the Appointments Review Committee decided not to recommend his appointment because the provisions of section 18C(a) apply to him, then the Minister shall not approve the appointment, unless he made objection against the decision and it was approved by the Government plenum; the provisions of section 18(a) shall apply to the said objection.

Property declaration

38. A person who has been appointed general manager of a Government company shall, at a time and in a manner and form prescribed by regulations, declare the assets, liabilities and sources of income of himself, of his spouse who lives with him and of his children whom he supports. He shall also declare, as aforesaid, any material changes in these data.

Functions

39. The general manager is responsible for the day-to-day conduct of the affairs of the company within the framework of

the budget and plans determined under section 32(a)(2) and of the decisions of the board of directors.

Powers

40. (a) The general manager shall have all the powers that may be conferred on a manager under the Companies Ordinance and the basic documents of the company, except the powers vested by this Law in the board of directors or any other authority.

(b) The general meeting may limit or restrict the powers of the general manager, and so may the board of directors. A decision to do so shall be submitted to the Registrar of Companies and the Authority.

Duty to Report

41. (a) The general manager shall without delay notify the chairman of the board of directors of any material matter of the company which concerns the functions of the board of directors. If the matter exceeds, or is likely to exceed, what has been determined by the board of directors under section 32(a), or is one of the matters enumerated in section 35, the chairman of the board of directors shall without delay convene a meeting thereof and shall place the notification before it.

(b) The general manager shall deliver to the board of directors, at the times prescribed by it, a report on the day-to-day activities of the company.

Termination of tenure

42. (a) The general manager shall cease to hold office if -

(1) he resigns by delivering a letter of resignation to the chairman of the Board of Directors; or

(2) the Government removes him from office; or

(3) the Board of Directors removes him from office by a decision of a majority of those participating in the vote; or

(4) the Board of Directors finds, during the first year of his tenure, that he is not suited to his position; or

(5) the Board of Directors finds that he is permanently unable to perform his tasks; or

(5a) the Cabinet Committee decides, on the recommendation of the Minister of Finance and in accordance with

an opinion by the Authority, that he does not perform his task in a manner designed to advance implementation of the decision on privatization, or that he acted - in deed or by omission - in a manner designed to detract from the company's ability to comply with a lawful instruction or request under sections 59D or 59E;

(6) he is convicted of an offense which - in the Attorney General's opinion - involves moral turpitude and requires discontinuation of his tenure; or

(7) he becomes disqualified for his position according to the Companies Ordinance or any other Law; or

(8) the company is wound up.

(b) The tenure of the general manager shall terminate -

(1) in case of resignation - three months after the day on which his letter of resignation was delivered, unless the Board of Directors prescribes an earlier date;

(2) in any of the cases said in subsection (a)(2) to (5a) - on the day prescribed in the decision;

(3) in the case said in subsection (a)(6), upon delivery of notice to the chairman of the Board of Directors;

(4) when the company is being wound up - when winding up begins.

(c) When the tenure of a general manger has terminated, the Board of Directors shall appoint an acting general manager, pending the appointment of a general manager under section 37, and if the tenure terminated under subsection (a)(5a), then the appointment of an acting general manager requires the Authority's approval.

Suspension

43. (a) The Board of Directors may suspend a general manager, if it has reason to suspect that he committed a criminal offense which caused damage to the company, and it shall suspend him if information has been filed against him for an offense, which in the Attorney General's opinion justifies suspension.

(b) When the general manager has been suspended the Board of Directors may appoint an acting general manager for the period of his suspension.

Chapter Six: HOLDERS OF SPECIAL OFFICES

Article One: Auditor

Appointment and remuneration

44. (a) The appointment of an auditor for a Government company shall require the approval of the Authority.

(b) A member of the Knesset shall not be an auditor of a Government company and shall not be a partner in a partnership, or a shareholder in a body corporate, which is an auditor of a Government company.

(c) The Minister of Finance, together with the Minister of Justice, may, with the approval of the committee, prescribe rules as to -

(1) the modes of appointing, and of annulling the appointment of, an auditor of a Government company;

(2) conditions and qualifications for the appointment;

(3) the apportionment of appointments to Government companies among qualified auditors;

(4) the length of time that an auditor may serve with a Government company.

(5) the remuneration of auditors of Government companies.

Duty to Report.

45. Notwithstanding anything provided in any other law, the auditor of a Government company shall, at the request of the board of directors, the Ministers or the Authority, deliver to it or them information as to the affairs of the company, carry out a special inspection with the company and deliver to it or them a report of the results thereof.

Replacement.

46. A Government company shall not annul the appointment of an auditor during his period of tenure unless the Authority

has given him an opportunity to be heard before it and has approved the annulment.

Article Two: LEGAL ADVISERS

Appointment and remuneration.

47. (a) The appointment of a legal adviser to a Government company shall require the approval of the Authority.

(b) A Member of the Knesset shall not be a legal adviser to a Government company and shall not be a partner in a partnership, or a shareholder in a body corporate, which is a legal adviser to a Government company.

(c) The Minister of Finance, together with the Minister of Justice, may, with the approval of the Committee, prescribe rules as to -

(1) the modes of appointing, and of annulling the appointment of, a legal adviser to a Government company;

(2) conditions and qualifications for the appointment;

(3) the apportionment of appointments to Government companies among qualified advocates;

(4) the length of time that an advocate may serve as a legal adviser to a Government company;

(5) the remuneration of legal advisers to Government companies.

Article Three: INTERNAL CONTROLLER

Appointment.

48. The board of directors of a Government company shall appoint an internal controller for the company unless the Authority certifies that the volume or character of the company's activities does not necessitate the appointment of an internal controller.

Powers and status.

49. (a) The board of directors shall prescribe the functions and power of the internal controller.

(b) The internal controller shall be subordinate to the chairman of the board of directors and the general manager

and shall submit his reports and proposals to the board of directors.

Applicability

49A. If the provisions of section 96A of the Companies Ordinance (New Version) 5745-1985 hold true for a Government company, then the provision of section 96WI shall apply, even if its is an inspected body.

Article Four: REPRESENTATIVE OF THE STATE AT GENERAL MEETING

Appointment and instructions.

50. (a) The Minister shall appoint a representative of the State to take part in and vote at the general meeting of a Government company by virtue of the shares the State holds therein.

(b) Notice of the date of a general meeting shall be given to the Authority at least two weeks in advance unless the Authority has agreed to a shorter period.

(c) The Ministers may, after consultation with the Authority, instruct the representative how to vote at the general meeting.

Chapter Seven: GOVERNMENT COMPANIES AUTHORITY

Establishment of authority.

51. There is hereby established a "Government Companies Authority".

Director of authority.

52. (a) The functions of the Authority shall be carried out by the Director of the Authority.

(b) The Director of the Authority shall be appointed by the Government upon the proposal of the Minister of Finance. Notice of the appointment shall be published in *Reshumot*. The duty of announcing the vacancy under section 19 of the

State Service (Appointments) Law, 5719-1959), shall not apply to the appointment.

Advisory Committee.

53. (a) The Minister of Finance shall appoint an Advisory Committee to the Director of the Authority. Notice of the appointment and composition of the Committee shall be published in *Reshumot*.

(b) The Director of the Authority shall consult with the Advisory Committee on matters relating to Government companies generally or to particular categories thereof.

Functions of Authority.

54. The Authority shall -

(1) advise the Government, through the Minister of Finance and the Ministers, on matters relating to Government companies;

(2) in accordance with directives from the Government, deal with matters common to all Government companies or to particular classes thereof;

(3) follow up and assist in the implementation of the State Comptroller's recommendations relating to Government companies;

(4) advise and assist Government companies in the conduct of their business;

(5) follow up continuously the activities of each Government company, the implementation of its objects, the course of its business, its financial position and its wage policy and communicate its findings to the Ministers;

(6) examine the reports submitted to it by a Government company and the material on which they are based and make its comments thereon to the company and the Ministers;

(7) deal with and assist in the establishment, winding-up and amalgamation of Government companies, as well as in compromise settlements and arrangements and the reorganization and the sale of shares thereof;

(7a) advise the Cabinet Committee on matters connected with privatization and deal with the implementation of decisions on privatization;

(8) to perform, in respect of a Government company, any function with which it is charged by the Government of by the Ministers;

(9) to perform any other function with which it is charged by this Law.

Obtaining information

55. For purposes of performing its functions, the Authority may request of a Government company and also of a Director on behalf of the State or of the general manager of a Government company - and through him of any person employed by or engaged in the service of the company - information and material on the affairs of the company and may inspect records and documents of the company.

Duty to report.

56. (a) The Authority shall deliver a report on its activities to the Government, through the Minister of Finance, and to the Committee, at the request of each, but at least once a year.

(b) The Authority shall once a year deliver to the Minister of Finance a report on Government companies, setting out, in respect of each, the rights of the State therein, the principal objects thereof, the holders of office therein and the main content of its last financial reports. The Minister of Finance shall bring the report before the Committee.

Chapter Eight: SUBSIDIARY, MIXED AND FOREIGN COMPANIES

Application of Law to subsidiary companies

57. This Law shall apply to a Government subsidiary company in like manner as it applies to a Government company, subject to the following provisions:

(1) the Minister responsible for the affairs of the parent company is also the Minister responsible for the affairs of the subsidiary company;

(2) a decision of a subsidiary company requiring the approval of the Government under section 11 shall be brought before the Ministers through the parent company for the purpose of obtaining the said approval, and a document which a subsidiary company has to submit to the Ministers, the Authority or some other addressee shall be submitted through the parent company.

(3) a Director of a subsidiary company on behalf of the parent company shall be appointed by the Board of Directors of the parent company; the appointment requires approval by the Ministers, after consultation with the Appointments Review Committee; the provisions of sections 16A, 17, 17A, 18A and 18C shall also apply to a said Director;

(4) information given under section 20 by a Director of a subsidiary shall also be given to the chairman of the Board of Directors of the parent company.

(5) a letter of resignation of a Director of a subsidiary shall also be delivered to the chairman of the Board of Directors of the parent company, and notice by the Ministers under section 22(a)(2) to (6) shall also be given to the parent company.

(6) if the Government sold shares which it held in the parent company, or if the parent company sold shares that it held in the subsidiary, then some or all of the Directors of the subsidiary who were appointed on behalf of the parent company shall cease to hold their positions from the day announced by the Authority to the company, if that is required by the sale transaction; if the sale transaction requires that only some of the said Directors cease holding their office, then the Ministers shall decide - after consultation with the Appointments Review Committee - which of the Directors shall cease to hold office.

Application of Law to mixed companies.

58. (a) The following provisions shall also apply, *mutatis mutandis*, to a mixed company.

(1) sections 5 and 6, for the purpose of the establishment of the company;

(2) section 8, for the purpose of the conversion of a non-Government company into a mixed company;

(3) section 14, for the purpose of the sale of shares in the company held by the State;

(4) Chapter Three, for the purposes of directors-on-behalf-of-the-State;

(5) section 50(a) and (c), for the purpose of the representation of the State at a general meeting of a mixed company;

(6) sections 54(1), 54(7a) and 56(b), for the purposes of the Authority; in order to perform its functions, the Authority may request information and material on the affairs of the company from a Director on behalf of the State in a mixed company;

(7) for purposes of privatization - Chapter Eight "A", except for sections 59B(a)(4) and 59E.

(b) The Authority shall examine any information and material received by it concerning a mixed company and shall make its comments to the Ministers and to a director-on-behalf-of-the-State.

(c) The provisions of subsection (a)(2) and (3) shall not apply to the purchase and sale of shares on the stock exchange.

Application of provisions to foreign company.

59. (a) The following provisions shall also apply, *mutatis mutandis*, to a company incorporated outside Israel (hereinafter referred to as "a foreign company"):

(1) sections 5 and 6, in respect of the establishment of a foreign company which, if it were established in Israel, would be a Government company or a Government subsidiary company;

(2) section 8, in respect of the conversion of a foreign company into a company which, if it were an Israeli company, would be a Government company or a Government subsidiary company;

(3) sections 17 to 23, in respect of the directors-on-behalf-of-the State of a foreign company, in so far as those sections

are not repugnant to the basic documents of the company or to the laws of the country in which it is incorporated.

(b) A representative of the State at a general meeting of a foreign company shall, with regard to matters referred to in section 11(a), vote only in accordance with instructions from the Ministers. They shall submit the proposed decision to the Government, as provided in section 11(b) and shall issue instructions in accordance with its decision.

Chapter Five "A": PRIVATIZATION

Cabinet committee

59A. (a) The Government shall set up a Cabinet Committee on Privatization, its members being the Prime Minister, the Minister of Finance and the Minister of Justice; the Government may coopt one or two additional members to the committee.

(b) The quorum at committee meetings shall be two members, when the committee has three members, and three members when the committee has more than three members.

(c) The Cabinet Committee's decisions shall be adopted by a majority of its members.

Decision on privatization

59B. (a) The Cabinet Committee may decide on the privatization of a Government company, in a said decision the committee shall prescribe the manner of the company's privatization, which shall be one of the following or a combination of them:

(1) sale of the company's shares by prospectus or in some other manner prescribed by the Cabinet Committee;

(2) dilution of the Government's holdings in the company by an issue - by the company - of shares or other capital securities;

(3) an issue - by the State - of securities convertible into share or other capital securities of the company owned by the Government;

(4) the sale of a substantive asset of the company, or of all its assets, including rights;

(5) a change in the rights attached to the shares;

(6) a reorganization, compromise or arrangement said in section 233 of the Companies Ordinance, merger, receivership, winding up or cessation of activity, cessation of winding up or of receivership proceedings, and also the establishment of a Government company, Government subsidiary or mixed company, all in order to implement the privatization;

(7) some other method prescribed by the Ministers.

(b) A draft decision on privatization shall be brought before the Cabinet Committee by the Ministers or by one of them, together with the Authority's opinion; if the Authority finds that a decision on the privatization of a company should be adopted, and if none of the Ministers so proposed to the Government, then the Authority shall submit its opinion in a reasoned memorandum to the Ministers and to the Cabinet Committee, and each of the members of the Cabinet Committee may submit a draft decision on privatization.

(c) A draft decision on privatization shall be brought before the Cabinet Committee after consultation with the Board of Directors of the relevant company; the stand of the Board of Directors shall be brought before the Cabinet Committee, and if the Board of Directors does not adopt a stand within 21 days after it was asked to do so, then the Cabinet Committee may weigh the proposal before it and decide on it.

(d) The Cabinet Committee shall give the following an opportunity to state their case before it -

(1) the Minister responsible for the company's affairs;

(2) the Board of Directors of the company, by the chairman of the Board of Directors or by a person appointed for that purpose by the Board of Directors.

(e) The provisions of section 14 shall not apply to a decision on privatization, and the provisions of section 5 shall not apply to a decision to set up a company under subsection (a)(6).

(f) The Cabinet Committee is empowered to decide, in respect of a company that undergoes privatization, on any question that requires the Government's approval or decision under this Law.

(g) Notification that a decision on the privatization of a company has been adopted shall be published in *Reshumot*; a copy of the decision on privatization shall be sent to the Committee, to the company and to the Companies Registrar; the provisions of this subsection shall not apply, if the Cabinet Committee so decided for reasons of national security, of foreign relations or of international trade relations.

General meetings to carry out structural changes

59C. (a) When a decision on privatization has been adopted and when the Authority prescribed by written notification to the company - after the Minister of Finance was informed - that implementation requires acts or decisions by the general meeting of the company that undergoes privatization, including the amendment of its memorandum and by-laws, then - if the Board of Directors failed to call a general meeting for a day not more than 30 days after the Authority asked it to do so - the Authority shall be authorized to call general meetings of all shareholders or of categories of shareholders for the adoption of aforesaid resolutions, and it may vote at them by virtue of the shares which the Government holds in the company that undergoes privatization; the provisions of section 50 shall not apply to an aforesaid meeting.

(b) If the company that undergoes privatization is wholly Government owned then the Authority may call an aforesaid general meeting with advance notice of at least seven days, notwithstanding the provisions of any enactment or of the company's memorandum and by-laws.

(c) Subject to the provisions of subsections (a) and (b), if privatization of the company requires procedures under the Companies Ordinance or under the company's memorandum and by-laws, including the calling of meetings, the adoption of resolutions by special majorities and approval by a Court, then

the decision on privatization shall not derogate from the need to take those steps.

Preparation and delivery of information an documents

59D. The following obligations shall apply to the company that undergoes privatization and to its ranking employees, to the extent that the Authority so requires of them in writing from time to time.

(1) to deliver to the Authority and to experts on its behalf - or to make available for their inspection - all the information and documents in their possession, or which they are able to obtain or to prepare by reasonable efforts (hereinafter: information), to the extent that the Authority finds them necessary in order to prepare the company for privatization, to implement the decision on privatization, or to assess the value of the company, of its shares or of its assets;

(2) to deliver information to the person likely to purchase the company's shares or assets, who is certified by the Authority for purposes of this paragraph, or to experts on his behalf, to the extent necessary - in the Authority's opinion - for a valuation of the company, of its shares or assets; information shall be delivered under this paragraph subject to secrecy agreements, as the Authority shall instruct after consultation with the company's general manager in order to prevent misuse of the information or breach of the company's commercial secrets;

(3) to prepare every outline or prospectus required for the sale offer for implementation of the decision on privatization; if the company is not wholly owned by the Government, the Government shall bear all expenses incurred by the company for preparation of the said documents, and if the sale offer is combined with a securities issue by the company, then the Government and the company shall bear the expenses in proportional parts.

Instructions

59E. (a) When a decision on privatization has been made and the Authority has decided that - in order to prepare the

company for privatization or in order to implement the decision on privatization - it is necessary that the company perform a certain act, it shall so inform the chairman of the Board of Directors of the company and request him to decide on performance of the act within a reasonable period set by the Authority in its notification.

(b) If the Board of Directors does not, within 14 days from the date of the Authority's notification, decide to perform the act, or if it decided on its performance, but the company does not perform it within the time set by the Authority, then the following provisions shall apply.

(1) if the company that undergoes privatization is wholly Government owned, then the Authority shall be authorized - with approval by the Cabinet Committee - to instruct it to perform the act, and the company must comply with the instruction, whether or not the act is in accordance with the business considerations according to which the company customarily acts, were it not for the privatization (hereinafter, business considerations); if the company does not comply with the instruction within the period set by the Authority, then the Authority may perform the act, by itself or through a person appointed by it for that purpose, and the act of the Authority or of that person shall be deemed, for all intents and purposes, to be an act of the company;

(2) if the company that undergoes privatization is not wholly Government owned, then the Authority shall be authorized - after the company's Board of Directors has been given suitable opportunity to state its position, and with approval by the Cabinet Committee - to instruct the company to perform the act, and the company must comply with the instruction; however, if the instruction does not conform to business considerations, then the provisions of sections 4 and 9 shall apply;

(3) if the company does not comply with the Authority's instruction under paragraph (2), then the Authority may -

(a) apply to the Jerusalem District Court, and the Court may issue an order that permits the Authority to carry out the instruction, by itself or through a person appointed by it for that purpose;

(b) call an extraordinary general meeting of the company, propose and - by virtue of the shares held by the Government in the company - vote for resolutions to instruct the Board of Directors to have the Authority's instructions carried out by the company or by a person appointed by it for that purpose;

(c) The provisions of subsection (b) shall not apply to a company, the securities of which have been offered to the public by prospectus.

(d) For purposes of this section, "act" - any action or omission, including an arrangement and registration of rights, making a contract or refraining from doing so, appointments and dismissals, taking legal steps or refraining therefrom, and compromise.

Responsibility

59F. (a) The company, its officers and employees shall perform any obligation and act under sections 59D and 59E in a manner that will prevent or reduce as much as possible any damage liable to be caused to the company or to a third party in consequence of the performance.

(b) Notwithstanding, the provisions of any enactment, performance of any obligation and act under sections 59D and 59E by an officer or employee of a company that undergoes privatization, or any other act performed by them for the proper implementation of the decision on privatization shall not be grounds for a civil suit against them, provided they acted in good faith and in accordance with the provisions of subsection (a); however, in respect of a claim under Securities Law 5728-1968 the provisions of that Law shall apply.

(c) A company that undergoes privatization shall be entitled to -

(1) compensation from the State for any damage caused

to it directly by performance of an obligation or instruction under sections 59D or 59E, provided the provisions of subsection (a) have been complied with; this provision shall not apply to a wholly Government owned company;

(2) indemnification from the State for any payment for which it became liable to a third party - because of the performance of an obligation or instruction under sections 59D or 59E - under a final judgment or arbitrator's decision, including reasonable legal expenses, provided the provisions of subsection (a) have been complied with and the state has been given proper opportunity to join the proceedings in order to defend itself.

Chapter Nine: APPLICATION OF THIS LAW

Application to bodies other than share companies

60. The provisions of this Law shall also apply, *mutatis mutandis,* to companies without share capital and bodies corporate other than companies, except statutory bodies, if the State controls or participates in them to the extent specified in section 1(a) in respect of a Government company.

Appointments in other bodies corporate and bodies set up by law

60A. (a) Notwithstanding the provisions of section 60, the provisions of sections 16A, 17, 17A, 18A to 18C; 24(c) and (d), and 37(c) and (d) shall apply to appointments to positions in bodies corporate set up by law and in other bodies set up by enactment, *mutatis mutandis* as the case may be and as specified hereinafter, all if the appointment is by a Minister or by the Government, or on the recommendation or with the approval of any of them, subject to the provisions of the Law or enactment by virtue of which the body corporate or body is set up; if the Law provides that representatives of bodies or organizations enumerated in that Law be appointed to the aforesaid bodies corporate or bodies, then the provisions of this Law shall not apply to those representatives.

(b) The changes are as follows:

(1) wherever the terms "Director", "chairman of the Board of Directors" or "general manager" appear, they shall be read as "member of the council, member of the authority or member of the body who holds a position similar - even if designated differently - to that of chairman or general manager of those bodies, as the case may be";

(2) in section 18B(a), instead of "Minister of Finance", read "Minister of Justice";

(3) in section 18B(b), paragraphs (2) and (3), instead of "public personality" and "representative of the Authority", read "two representatives of the public, chosen by the chairman of the Committee from a list - composed for this purpose by the Ministers of Finance and of Justice after consultation with the Council for Public Bodies Corporate - of public personalities who meet the qualifications set in this Law for a chairman of a Board of Directors, and who have no personal, business or political link with any Cabinet member;

(4) in section 18B(d)(3), instead of "the Committee shall communicate its opinion on the candidate to the Ministers in writing", read, as the case may be, "the Committee shall communicate its opinion to whoever recommended the candidates, approves them or appoints them";

(5) for purposes of this section, "other bodies set up by enactment" - bodies enumerated in the Schedule to this Law, which are bodies of persons whom the enactment designates as a council, authority council, administration, management committee or other body with similar tasks, even if it bears a different name, all if its members include representatives of the public, the Minister of Justice may add other bodies set up by enactment to the list of bodies enumerated in the Schedule and - with approval by the Knesset Constitution, Law and Justice Committee - he may strike out a body that appears in the Schedule.

Application to certain bodies.

61. (a) For the purposes of this Law, there shall also be regarded as a Government company -

(1) the National Water Authority, within the meaning of section 46 of the Water Law, 5719-1959):

(2) a company in which half the voting power at general meetings or the right to appoint half the number of directors is held by the State and at least one quarter of the voting power or the right to appoint at least one quarter of the number of directors is held by a local authority or a company controlled by it.

(b) For the purposes of the establishment of a company referred to in subsection (a)(2), the proposal referred to in section 5(a) shall be submitted after consultation with the Minister of the Interior.

Inapplicability to agricultural councils.

62. This Law shall not apply to a company acting as a council for agriculture production or marketing.

Inapplicability in special cases.

63. The provisions of this Law shall not apply, wholly or in part -

(1) to a company in respect of which the Government, with the approval of the Committee, has decided that reasons of State security, foreign relations or international trade relations so require;

(2) to a foreign company engaged in a kind of activity in respect of which the Government, with the approval of the Committee, has decided that reasons as aforesaid require that the said provisions shall not apply to a company engaged therein.

Provisions nor applicable when capital is to be raised

63A. The empowering provision in section 4(a) or the provisions of section 33(c) shall not apply to a company, in respect of which the Government decided - with approval by the Committee - that for reasons of a public share offering it

is necessary that they not apply to it; in this section, "shares" - certificates issued by the company in series, which entitle to membership or participation in it, or which entitle to acquire aforesaid shares.

Chapter Ten: MISCELLANEOUS PROVISIONS

Saving of powers of State Comptroller

64. Nothing in this Law shall derogate from the State Comptroller's functions or powers under the State Comptroller Law (Consolidated Version) 5718-1958 or under any other Law.

Saving of State Property Law

65. This Law shall not derogate from the provisions of the State Property Law 5711-1951.

Powers cannot be delegated

66. The powers of the Ministers under this Law cannot be delegated.

Notification of suspicion of offense

67. If the Ministers receive information under this Law, which raises suspicion that a criminal offense has been committed, they shall inform the Attorney General accordingly.

Penalties

68. (a) If a Director on behalf of the State knowingly violates the provisions of section 20, if a general manager of a Government company or of a Government subsidiary knowingly violates the provisions of section 41, and if a representative of the State fails to comply with instructions given him under sections 50(c), 58(a)(5) or 59(b), he shall be liable to one year imprisonment or a fine of IL20,000.

(b) For purposes of subsection (a), it is immaterial whether the offense was committed in Israel or abroad, and courts in Israel shall be competent to try a person even if the offense was committed abroad.

(c) If a person knowingly contravened a request by the Authority in accordance with section 55, he shall be liable to one year imprisonment.

Amendment of Penal Law Amendment (Public Servants) Law

69. In the Penal Law Amendment (Public Servants) Law 5717-1957, add the following after section 1(10):

"(11)a Director on behalf of the State of a Government company, of a Government subsidiary or of a mixed company, as defined in the Government Companies Law 5735-1975, and a person employed by or engaged in the service of an aforesaid company,"

Transitional provisions

70. (a) A person who, before this Law came into effect, was appointed Director on behalf of the State in a Government company, a Government subsidiary company, a mixed company or a foreign company shall cease to hold office not later than eighteen months after the coming into force of this Law unless he is reappointed under the provisions of this Law.

(b) A member of the Knesset who immediately before the coming into force of this Law holds one of the offices which this Law debars a Member of the Knesset from holding may continue holding it as long as he is a Member of the Eighth Knesset.

(c) This Law shall not affect any contract entered into by a Government company before its coming into force.

Implementation and regulation.

71. The Minister of Finance is charged with the implementation of this Law and may make regulations as to any matter relating to its implementation.

Commencement

72. This Law shall come into force upon the expiration of six months from its adoption by the Knesset.

SCHEDULE

(Section 60A)

1 Moving Pictures Censorship Board - Cinematographic Films Ordinance, 1927
2. Cable Broadcasts Council - Telecommunications Law 5742-1982
3. Museums Council - Museums Law 5743-1983
4. Investments in Agriculture Administration Council - Encouragement of Capital Investments in Agriculture Law 5741-1980
5. Advisory Council - Petroleum Law 5712-1952
6. Advisory Council - Encouragement of Capital Investments Law 5719-1959

REFERENCES

References to the Law here translated and to legal measures mentioned in it are listed below. Where possible, we refer to English language versions, both *Laws of the State of Israel* (LSI), published by the Minister of Justice, and the consolidated law translations produced by A.G. Publications. The following abbreviations are used:

A.G.	A.G. Publications
L.P.	Laws of Palestine, 1934
LSI	Laws of the State of Israel
LSI (NV)	Laws of the State of Israel, New Version
NV	Sefer Ha-Chukkim, New Version
S.H.	Sefer Ha-Chukkim, the official Hebrew language gazette of legislation passed by the Knesset

AFFIDAVIT OF DOV WEISSGLAS

TEL AVIV §
§
ISRAEL §

Dov Weissglas, after first being duly sworn upon his oath, makes this affidavit and states the following.

1. My name is Dov Weissglas. I am over the age of twenty one (21) years, am competent to testify to the matters stated herein, have personal knowledge of the facts and statements in this affidavit, and each of the facts and statements is, to the best of my knowledge and belief, true and correct.

2. I am a graduate of the Faculty of Law of the Hebrew University of Jerusalem (Tel Aviv adjunct in 1970) and I have practised law in Israel since 1971.

I am a senior partner in Moritz, Weissglas & Almagor, Law Office (which was established in 1965) and my fields of specialisation are commercial law, company law, torts and insurance.

3. Dead Sea Bromine Co. Ltd (hereinafter referred to as "Bromine") is a "government company" within the meaning of such expression in the Government Companies Law, 5735-1975 (hereinafter referred to as "the Law").

The definition of a company as a government company is determined in accordance with the direct or indirect holding percentage of the shares therein by the State of Israel. Bromine is controlled by a government company and accordingly is itself a government company. However, to the best of my understanding, Bromine is not in any way an arm or an organ of the State, nor is it a government department or authority. Bromine is a commercial company for all intents and purposes. I base my opinion on the following points:

(a) By statute, a "government company" is required to act just as any commercial company on an ordinary business basis. Section 4 of the Law provides as follows:

"4. (1) A government company shall act in accordance with the business considerations by which a non-government company is normally guided, unless the Government, with the approval of the Committee, prescribes other considerations for acting . . ."

One could not err in interpreting the expression "government company" and infer therefrom that a government company is subject to directions or considerations of the Government in its management and operations, unless the statutory exception described in clause (b) below applies.

A government company is not an organ of the State, it is a separate and distinguished legal entity. Pursuant to Israeli law, it is managed in accordance with commercial considerations, it does not enjoy the immunities which the State enjoys and it is not subject to the duties and restrictions that apply to the Government.

(b) In the wording of section 4(a) of the Law, there is an exception which confers upon the Government the power to make a decision whereby a government company shall act in accordance with 'other' considerations, i.e. considerations which are not ordinary commercial considerations.

Section 63A of the Law prescribes that the empowering provision at the end of section 4(a) of the Law shall not apply if the Government has made a decision thereon for reasons of offering shares to the public. The guiding concept that lies at the basis of this section is that when a government company's shares are offered to the public and such shares are listed on a stock exchange, the Company must act in accordance with pure business considerations. An investor from amongst the public purchasing shares in a government company, just as in any other company, for the purposes of obtaining a profit, is

interested in the Company operating according to business considerations and should not be howsoever guided by other considerations of the Government. Accordingly, the legislature understood that when it is wished to offer shares to the public, the empowering provision in section 4(a) must be repealed and it must be guaranteed to all that the Company will continue to operate, just as every commercial company, in accordance with ordinary commercial considerations. It is not a tool in the hands of the Government to attain goals. It is a business company, just as every ordinary commercial company, private or public.

On 19th February 1992, the State of Israel and Israel Chemicals Ltd made an offer of Israel Chemicals Ltd's shares to the public. The Government decided, on 1st September 1991, pursuant to section 63A of the Law, that the empowering provision in section 4(a) would not apply to Israel Chemical Ltd or members of its group, of which Bromine is one. Thus, pursuant to this decision, the Government is not entitled to dictate to Bromine other considerations for acting, and the Company is obliged to act in accordance with business considerations, just as any other commercial company.

The State of Israel holds a special share by virtue whereof it is entitled to object to exceptional operations in the Company which may jeopardise the State's vital interests. To the best of my understanding, the special State share is intended to provide the State with the possibility of preventing hostile entities taking control of the companies and to ensure that the companies shall remain Israeli companies. Thus, the special share has not implications on the routine management of all the companies in the concern.

(c) According to customary law in Israel, and as I was explained also in the United States, directors of a company are obliged to act in good faith for the benefit of the Company. The Barak Commission, which was appointed in 1969 by the

Minister of Justice and the Minister of Finance in order to prepare the Draft Law and which was headed by Prof. A. Barak (who is today the Deputy Chief Justice of the Supreme Court of the State of Israel), stated the following on this matter in its report (page 29):

> "The director of a government company must act according to what appears to him in good faith as being for the benefit of the government company . . . The director's duty of trust is to the government company and to it alone. He is not a representative of the shareholders and he is not subordinate to the appointing ministers. He is an organ of the Company and he owes it and only it a duty of trust."

A true and correct copy [of page 29 of the report] is annexed hereto as Exhibit A.

If the directors of a government company, such as Bromine, should pass resolutions the object whereof is to serve any interest of the Government, which is not in the business interest of Bromine, they would thereby be breaching the duties of trust which they bear and they may be sued in such regard by shareholders from amongst the public by way of a derivative action.

Moreover, and in addition to a director of a government company being under a duty to act in good faith for the welfare of the Company and for a proper object only, he must also exercise free discretion in a government company such as Bromine, to which the last part of section 4(a) of the Law does not apply, may not accept instructions from the Government as to the manner in which he votes.

(d) Bromine, just as every government company, is a legal entity which is separate and distinct from the State. The existence of the separate legal entity finds expression in a variety of fields, inter alia: the Company's employees are not employees of the State, government companies are entitled to

file and have actually filed various legal actions against the State of Israel. For example, a hearing is presently pending before the Supreme Court sitting as a High Court of Justice (HCJ 1255/94) on a petition filed by Bezeq - The Israel Communication Corporation Ltd (a government company) against the State of Israel - the Minister of Communications. The Israel Electric Corp. Ltd (which is also a government company) has filed a petition with the Supreme Court, in HCJ 3014/93, against the State of Israel - the Minister of Finance.

(e) The State of Israel had adopted an overall policy of privatizing government companies. The privatization of the companies in the Israel Chemicals concern (including Bromine) has been given paramount priority and by virtue thereof 25% of Israel Chemicals' shares have been offered to the public on the Tel Aviv Stock Exchange. This is a first step in a line of action which will in future result in a greater reduction in the State's shareholdings in companies of the concern.

In summary, to the best of my knowledge and understanding, Bromine is not an organ of the State and it is not subordinate to its directions. The Company is a separate legal entity which can sue or be sued by the State. The Company is obliged to act in accordance with ordinary commercial considerations. The Government is not entitled to give the Company directions to act according to considerations that are not commercial. The Company's directors may not conduct its affairs in accordance with the Government's considerations, but only from the point of view of the Company's welfare. The Company is not an instrument or tool to be used by the State to attain any object whatsoever, it is not an agency or an instrument of the State and is not subordinate thereto.

FURTHER, AFFIANT SAITH NOT.

/s/

DOV WEISSGLAS

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public, by DOV WEISSGLAS, on this . . . day of May, 1994 to certify which witness my hand and seal of office.

Notary Public in and for the State of *

(Printed Name of Notary)

My Commission Expires:

UNITED STATES DISTRICT COURT
EASTERN DIVISION OF LOUISIANA

LUCAS PASTOR CANALES MARTINEZ, et al.,	)	No. 95-3212
Plaintiffs, vs. DOW CHEMICAL CO., et al.,	)	
Defendants.	)	
LUCAS PASTOR CANALES MARTINEZ, et al.,	)	No. 95-3214
Plaintiffs, vs. DOW CHEMICAL CO., et al.,	)	
Defendants.	)	

DEPOSITION OF
NOAH EHRLICH

DATE: Friday, February 23, 1966
TIME: 9:50 a.m.
PLACE: CLEARY GOTTLIEB, STEEN & HAMILTON
55 Basinghall Street
London, England
REPORTER: VICKI CARD, C.S.R.
License No. 5211

VICKI CARD
CERTIFIED SHORTHAND REPORTING

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Q. Would you state your name for the record, please.
A. Noah Ehrlich.

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to your beginning work for them. Do you know when the company was first founded?
A. Dead Sea Bromine was founded in 1955.
Q. And when you say "Dead Sea Bromine," the full name is Dead Sea Bromine Company?
A. Company Limited.
Q. 1955, did you say?
A. Yes.

Page 16

Q. And how about Bromine Compounds Limited?
A. Bromine Compounds Limited was founded in 1962.
Q. Now, is it true that these companies are part of a larger family of companies? They have parents?
A. Yes.

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BY DAVID SIEGEL: Q. As of today, can you list every company that is related to dead Sea Bromine Company
Limited?
A. Dead Sea Bromine Company Limited as of today?
Q. Um-hmm.

Page 18

A. I believe so.
Q. What are they.
A. Okay. We'll start with Dead Sea Bromine Company Limited. We'll have Bromine Compounds Limited. We'll have
Bromine and Chemical in the UK; Eurobrom BV in Holland;

Ameribrom, Inc., in the U.S.; Bromochem Far East in Japan.
We'll have Landkem.
Q. What's the last one?
A. Landkem in South Africa.
Q. How do you spell that?
A. L-a-n-d-k-e-m. Landkem in South Africa. Those are companies that I believe are directly held by Dead Sea Bromine. Now we have subsidiaries of some of the companies. You want the —
Q. Yes, please.
A. Okay. Ameribrom has subsidiary by the name of High Yield Bromine, Inc. Eurobrom has a company by the name of Broomchemie BV.
Q. Could you spell that, please.
A. Yeah. It's B-r-o-o-m-c-h-e-m-i-e-, Broomchemie BV. Also, we have a subsidiary by the name of Bromisan, which is B-r-o-m-i-s-a-n, Brazil.

Page 19

Q. Okay. Now, if we went through the same exercise with Bromine Compounds Limited, is there a group of companies that's related to Bromine Compounds Limited?
A. No.
Q. How about Dead Sea Works Limited?
A. I cannot tell you.
Q. Okay. Israel Chemicals?
A. Israel Chemicals I can't tell you, either.
Q. To the — why can't you tell me with respect to Israel Chemicals?
A. Because there are such a large number of companies, I'm not sure I can.

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Q. Okay. Let's go through your work history at

Bromine—Dead Sea Bromine and Bromine Compounds Limited.
You first began working in April of 1976?
A. This is correct.
Q. What did you do when you first began working?
A. My first position was assistant to the general manager.
Q. And which company was it for?
A. It was—he was the general manager of Dead Sea Bromine and of Bromine Compounds Limited.
Q. What did you do in your capacity as assistant to the general manager?
A. I prepared economic evaluations, position papers

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and any other tasks that he asked me to do.
Q. What would be an example of a position paper, to the best of your recollection? What kinds of things would you write position papers about?
A. We will evaluate a new business, a new product line.
Q. So the general manager would come to you and say, "we're considering a new product line. I want you to write me a report about it"?
A. Correct.
Q. Can you recall a specific product that you did that for?
A. Yes, I can.
Q. What was that?
A. Sodium bromate, for example.
Q. And this is sometime in the time frame of 1976?
A. I would say around '77, '78.
Q. What was sodium bromide?
A. It was sodium bromate.
Q. Bromate? Can you explain what that is?
A. It's a chemical used in the textile and in the cosmetic field. At that time we were producing relatively

small quantities. We can develop a new technology that would give us a marketing and economic advantage, and we wanted to see how best we can capture a larger part of the market.

Page 23

Q. Where was the market for sodium bromate at that time?
A. It was worldwide.

* * *

BY DAVID SIEGEL: Q. Now, where did the idea, for example, for sodium bromate originate in terms of it being a business of Dead Sea Bromine's? How did the company, to your knowledge, originally get into the business of making sodium bromate?

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A. As I mentioned before, we did produce sodium bromate before. But one of our engineers had an idea how to produce it in a way that will save about 30 percent of the production cost. And once he proved that it can be done, then we started with our program.
Q. Can you think of another position paper that you wrote in '76, '77, shortly after beginning in your role as assistant to the general manager?
MR. BRANDT: Let me go ahead—I'm going—I'm not going to cut you off at this point, but I'm going to say I think we're getting pretty far afield. You've asked about his duty. He's given you an example. I'm happy for him to give you another example if he can think of one. We're bordering, I think, on total irrelevancy at this point.

BY DAVID SIEGEL: Q. Can you think of another one?
A. I cannot think of another one.
Q. What else did you do as an assistant to the general manager of Dead Sea Bromine and Bromine Compounds Limited besides write these position papers?
MR. BRANDT: Object to the form of the question as asked and answered already by the witness.
BY DAVID SIEGEL: Q. You've mentioned economic evaluations and drafting position papers. Is there anything else you can think of?
A. I prepared management reports for him.

Page 25

Q. What would a management report consist of?
A. Such as sales report, cost report, costing -- costing reports, et cetera.
Q. Now, specifically with reference to sodium bromate, when you wrote a position paper analyzing the possibility for expanding sales of that product, did you have any consultation with any government representative in your preparation of that report?
A. I had consultation with a representative from ICL, Israel Chemical Limited.

* * *

Q. Did you have any consultation with any government representative in drafting your position report, your position paper with respect to sodium bromate?
A. No.

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Q. Now, in your performance of your duties as coordinating sales in the North and South America territories, did you have an occasion to consult with government representatives?

MR. BRANDT: I'm sorry.
BY DAVID SIEGEL: Q. The State of Israel.
A. I — no.
Q. So you were able to perform these functions, including receiving orders, coordinating the production function, the shipping function, verifying credit, collecting the accounts on your own, without any assistance or involvement from the Israeli government?
A. Correct.
Q. Did the Israeli government have any input into the decision concerning which products to sell in those territories, the North and South American territories that you're discussing?
A. I'm not aware of it.
Q. Did the government have any input in defining the geographical scope of those territories? For example, did the government ever say, "we don't want you to sell products to that particular country"?
A. Are you talking about North and South America?
Q. Yes.

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A. I'm not aware of it.
Q. How would the company determine which countries to try to sell products in?
A. I would say that the criteria was the existing market for the product, the present and future economics of our involvement, and the availability of the product.

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BY DAVID SIEGEL: Q. All right. What did you do after you were working in this capacity as export/import coordinator?
A. I was assigned to join Ameribrom, Inc., our U.S. subsidiary.

Q. And this was 1980?
A. Yes.

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Q. Did you move to the United States?
A. Yes.
Q. Where did you work for Ameribrom?
A. Out of the New York office.
Q. And you were there until August of '85?
A. Until July of '85.
Q. What did your duties consist of when you worked for Ameribrom?
A. I was office manager and VP of the administration and finance.
Q. What did office manager duties consist of?
A. I was responsible for the daily operation of the office and to make sure that the people came to work and have all the means that's required to work. I was responsible for managing the orders, customer service, inventories, accounting, shipping.
Q. Now, at that time during your tenure with Ameribrom, what was—you may have already answered this question—what was its relationship to Dead Sea Bromine?
A. Ameribrom was a fully-owned subsidiary of Dead Sea Bromine.
Q. Was it a government company, as you understand that term?
A. What is the term of "government company"?
Q. You tell me.
MR. BRANDT: Well, no. You asked. If you have a

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definition you're using, tell him. You've asked him. He's told you he'd like a definition from you.
BY DAVID SIEGEL: Q. Are you familiar with the Government Companies Law in Israel?

A. Yes.
Q. And you understand that the Government Companies Law makes reference to government companies?
A. Yes.
Q. What's your understanding of what a government company is?
MR. BRANDT: I'm going to object to the form of the question as calling for a legal conclusion of this witness. He is not qualified as a lawyer.
If you understand, if you have an understanding, a layman's understanding, of what that term is, you're free to give it.
THE WITNESS: I'll give an answer.
It's a company that the government owns directly or indirectly more than 50 percent. It has the rights to nominate the majority of—of the directors. And some key functions that would be approved by the proper minister before taking office.

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Q. Okay. What did you do next after you left Ameribrom in July of 1985?
A. My next position was head of the finance department—sorry—the finance division of Dead Sea Bromine Group.
Q. You moved back to Israel?
A. Yes.
Q. How long did you occupy that position?
A. Till December 31st, 1991.
Q. What did you do as head of the finance division for the Dead Sea Bromine Group?
A. I was responsible for preparing the budgets for

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the group. I was responsible for the financial sheets,

including loans, et cetera. Insurance was under my responsibility, as well. I was in charge of making sure that our monetary assets are being watched and kept well. And I provided management with a—with management information, cost accounting, profit and loss, financial statement, that sort of thing.

Q. Now, in connection with discharging those duties as you've just described them, did you have occasion to interact with government representatives of the state of Israel?

A. Yes.

Q. Who would they be? I'm not—I don't mean their names, necessarily, but their titles or the parties of the government that they were from.

A. I had to deal with people from the Ministry of Industry and Trade, and from the Central Bank of Israel and from the Ministry of Finance.

(Discussion off the record between the witness and Mr. Brandt.)

And part of the Ministry of Finance of the government authorities.

What's the official name? Government Authority Company.

MR. BRANDT: Government Companies Authority.

THE WITNESS: Government Companies Authority.

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BY DAVID SIEGEL: Q. Now, with respect to the Ministry of Industry and Trade, what types of interaction would you have with that ministry in serving as head of the finance division?

A. Mostly involving investment, to make sure that they understand what we are doing, to get their approvals, to get grants if we fell in place. The chief Israeli scientist is also part of this ministry, and we had dealing with him to get grants for research and development.

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A. I will clarify. The chief scientist is involved in grants for R and D. In every year the budget process we prepare our R and D budget for the full year, representing specific project to chief scientist. They review it and, according to their revisions, it will determine the percentage of grant that they're going to provide.

Page 40

Q. Okay. Can you recall an instance of making a grant proposal requesting funds to do research and development and it being rejected?
A. Yes.
Q. What would that have been?
A. I don't know exactly the product, but sometimes they felt there was no innovation in the R and D, so it doesn't give anything new; or they felt that in the past they supported similar technology and, therefore, they will not.
Q. Okay. With respect to the category of investments, you began talking about increasing the production capacity at a certain location. Where was that?
A. I mentioned Sdom.
Q. Sdom, okay. So you—the company somehow determined that it wanted to increase production capacity, and that was going to require a certain amount of investment. And you had to go get approval to spend that money? Is that what you're saying?
A. No. The process was we prepared a business plan which has to be reviewed internally first. Once it was reviewed and approved, we would go to the ministry to get its approval, which include the allocation of grants.

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Q. And that's also the Ministry of Industry and Trade?

A. Yes.
Q. Now, the first step was an internal review. What would that consist of?
A. We will prepare a—the business plan would be prepared internally. And the technical, economic, research people will discuss it within the company. We will bring it to the board of directors for approval. And once it was approved by the board, we will proceed.
Q. Was the approval of the Ministry of Industry and Trade a requirement before Dead Sea Bromine could go forward with its plans for increasing the production capacity?
A. It wasn't a requirement. But the grants in Israel now about 38 percent. So this was a major consideration in the financing of the program.
Q. So this element of presenting the plan to the Ministry of Industry and Trade related to financing; it didn't necessarily relate to the ability to go forward if you were able to find other sources of financing for example; is that correct?
MR. BRANDT: We're talking about this one —
BY DAVID SIEGEL: Q. The Sdom plant.
A. You are correct. But, again, in our business plan and evaluations, the grant had a major importance.
Q. Okay. What—do you recall what happened in that

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specific instance?
A. The ministry asked some questions. They wanted to make sure how we are going to get the rest of the finance, where the equipments and machinery are going to come from.
They did—they conducted independent study to verify the finding. They made some minor changes. And they approved

it.
Q. Do you recall approximately what percentage of the funding for that project was represented by the government grant?
A. I mentioned about 38 percent. But I would say it was between 30 and 40 percent.
Q. And where did the rest of the funding come from?
A. The rest of the funding came from loans and internal sources.
Q. Now, how did the — how did the grant work? Was it simply a block grant of a certain amount of cash? Or was it a loan?
A. Actually, we get a permit. We apply to a bank. And we have to report on a regular basis to the bank about the progress to prove that the money was spent. And then we get refund for the — for the grants.
Q. But with respect to the 60 or 70 percent of the funding that did not emanate from this grant, did the government have any role whatsoever?
A. We had to get a permit from the Central Bank of

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Israel to borrow money out of Israel. This was part of the foreign currency regulation. But with the approval of the government, the Central Bank approval was much easier to obtain.
Q. Okay. The government didn't guarantee the remainder of those loans, did it?
A. No.

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BY DAVID SIEGEL: Q. Before we took a break, we were talking about this project of increasing the production capacity at the Sdom facility. During your tenure as head of the finance division, were there any other projects

similar to the one at Sdom that you can recall being involved in?
A. We had similar production capacity crews at our Ramat Hovav plant.
Q. Just so we can get an idea of the magnitude of these projects, how many—well, I was going to say how

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many dollars were involved. Would you have measured it in
U.S. dollars? Or what currency would you have measured it
in terms of the amounts of the loans and the grants?
A. It's all measured in dollars.
Q. Okay. With respect to the Sdom facility, how large a project was that in terms of total dollars, either borrowed or gotten through grants?
A. I would say that the project will vary between ten to 40 million dollars.
Q. And the project concerning the Ramat Hovav facility, was that of a similar magnitude?
A. Similar magnitude, yes.
Q. Okay. Now, did the Ramat Hovav project go through the same procedure in terms of generating a business plan and then presenting it to the Ministry of Industry and Trade for approval?
A. Same process, yes.
Q. Okay. Was a grant secured in that instance?
A. Yes.
Q. And what—in terms of a percentage, how much of the project was --
A. About the same.
Q. Thirty to 40 percent?
A. Yes.
Q. And where did the rest of the funding come from for that project?

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A. It's from internal generation of funds or loans.

* * *

BY DAVID SIEGEL: Q. Okay. Now, this whole line of questioning started with me asking you what sorts of government officials you would have occasion to interact with in your capacity as head of the finance division. And you mentioned the Ministry of Industry and Trade, the Central Bank of Israel and the Ministry of Finance. I think with respect to both the Sdom plant and the Ramat Hovav plant, we've talked about how you would present your business plan to the Minister of Industry and Trade. How, if at all, would the Central Bank or the Ministry of Finance be involved in these projects, or were they involved in these projects?

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A. I mentioned before that, in order to get loans in foreign currency, we require a permit from the Central Bank. But the involvement with the finance ministry is not necessarily related to those.

Q. Okay. What sort of involvement with the Ministry of Finance did you have during your tenure as head of the finance division?

A. For example, as a government-owned company, we are requested to bring the profits from the subsidiary operation. And we—in order to develop, further develop, our business, we're trying to return the profits outside. So we had to go to the Ministry of Finance to explain why we are requesting to keep the profits out, how we are going to make sure that in the future the government or the country will not suffer, et cetera. And this was almost on a continuous basis, meetings that related to that.

Q. What was the concern of the Ministry of Finance?

I'm sorry. I just didn't follow your answer. They were concerned about profits being kept out of the country?
MR. BRANDT: Why don't you read back his answer.
(Record read.)
BY DAVID SIEGEL: Q. Okay. Now, if you can help me clarify that, what did you mean when you said "return the profits outside"?
A. Companies that is selling and/or producing usually makes profits. The idea was that the profit of our

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subsidiaries will be paid back to Israel as dividends. Okay. And we wanted to return the profits in order to further develop the business. This is exactly what I mean.
Q. And when you say paid to Israel as a dividend, do you mean by virtue of their ownership of shares?
A. Yes.
Q. And so that would be true of any other entity that owned shares, as well? They were just — did they have some special claim to the payment of dividends because they were the government of Israel?
A. The government request that the profits will be brought back to Israel as dividend.
Q. And you wanted to retain them for further expansion of the business?
A. Correct.
Q. And this was, as you described it, an ongoing or a continuous issue?
A. Yes.
Q. How would it be resolved?
A. What? I — I don't understand the question.
Q. Well, what would — the government would say, "we want you to bring X number of dollars back into the country," and you would say, "No. We want to keep them

to
make the business stronger." How would that dispute be resolved?
A. We explain and, most cases, convince them it's

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better to retain the profits outside so we can increase our commercial involvement without the necessity of borrowing
money, et cetera. And to the best of my recollection, for a long period of time they agreed to keep the profits abroad.

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Q. Would you have any interaction with any government ministry in assessing the requisite amounts of insurance?
A. There was a period of time where we could not get coverage. This was during the Gulf War. And the government
at that time, through a subsidiary of it, provided some insurance.
Q. Okay. In ordinary times, outside of the time period of the Gulf War, did the government have any involvement in — in directing the company in terms of how
much insurance it should have?
A. No.
Q. Were you solely responsible for making that decision, or did you have a staff of people that helped you evaluate the company's needs with respect to insurance?
A. Actually, this was a responsibility of the board of directors to determine how much coverage we should have.
And my job was to obtain this coverage.
Q. Now, what were your duties with respect to preparing the budget of the Bromine—Dead Sea Bromine Group during that time frame from '85 to '91?
A. I was responsible for preparing the work plan and

26 the budget for the group. It's a process that takes about

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1 two to three months. We get instructions, guidelines from
2 ICL, from the—how do you call it authority?
—Government
3 Authority Companies. They give us some—some
guidelines
4 about labor cost, about similar items. We get from Israel
5 Chemical Limited—and I guess they get it somehow from
the
6 Minister of Finance—some evaluation about the economic
7 situation next year in Israel, inflation, exchange rate, et
8 cetera. Based on this on the one hand the marketing,
9 sales and production ability on the other hand, we prepare
a
10 document. And it is being reviewed internally, presented
to
11 a board subcommittee, which goes through it, then to the
12 board. And once the board is—it gets the board approval,
13 it's a --
14 Q. It's the budget?
15 A. It's the budget.
16 Q. Okay. Now, you mentioned getting some guidelines
17 from the Government Companies Authority concerning
labor
18 costs. Could you elaborate on that?
19 MR. BRANDT: I object to the form of the question
20 as being overly broad and ambiguous.
21 If you understand the question, you're free to
22 respond.
23 BY DAVID SIEGEL: Q. What did you mean when
you
24 said guidelines concerning labor costs?
25 A. The—the Government Companies Authority will
26 determine any labor—any wage increase. They will give
us

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next year it should be about that and that percent by sectors; bonuses will be minimum, maximum, and how to distribute, et cetera.
Q. Okay. Now, specifically with respect to wage increase, you're saying that the percentage of any annual wage increase would be dictated by the government, or was it simply a guideline in the sense of being a suggestion?
A. I would say that—let me put it this way. There are, actually, two levels of wage negotiation. There is a wage negotiation by a sector. And this is decided by the government. And there is a specific wage discussion by the company, which was decided by—mostly by Israel Chemical Limited. So we got from both the Government Authority Company and Israel Chemical Limited instruction about how much, to whom and how to do it.
Q. Okay. I think I understand that those are the two sources that you would be getting information from. But my question is: Were they—were they binding in any sense? Did the government have the power to tell you that, for the following types of employees, you may only increase their wages by this percentage, and you may not increase it by any amount greater than that?
A. Yes.
Q. And you had no authority to go to the government with a request for a deviation from those guidelines?
A. To the best of my knowledge, we did not do it.

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BY DAVID SIEGEL: Q. Well, if I understood your

testimony, you're saying that the government would tell you
that, for the next year, you're permitted to have a wage increase of two percent or three percent. That simply gives you the percentage of how much the amount can go up if you
choose to raise it that amount. Who set—who determined the base salary?
A. This was done by the human resources management.
Q. Of the company?
A. Of the company.

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Q. Okay. Other than guidelines about labor costs, what other sort of involvement in creating the budget would
the government have?
A. First of all, the representatives are part of the committee. They take active role in—I won't say in preparing, but in auditing and reviewing the budget.
Q. Okay. I'm not clear what you're talking about. You said "the representatives."
A. Usually, the government would have between two to three directors that are nominated by the different ministries.
Q. Okay. So the—
A. And—and there is a representative of the Government Authorities Companies, as well.

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BY DAVID SIEGEL: Q. After the budget was prepared, how did it become finalized as the budget for the company for any particular year?
A. We have a special board meeting that the main issue is approval of the budget. And it's become documented. All financial—internal financial reports we are producing compare the actual results to the budget. So

this is how we report on it during the year. We compare what we do to the budget.
Q. And then the board votes on the budget and either adopts it or doesn't adopt it, and then it's changed until it's acceptable?
A. Yes.
Q. Okay. When—when the board finally approves a budget, is it then presented to the government for any kind of review or approval?
A. I don't know.
Q. Well, you don't know because you don't remember or —you were head of the finance division for—
A. 1 —
Q. —six years. Do you recall ever having to present a budget to the government for approval?
A. I presented—no. To the budget (sic) for approval? No. I represent to ICL, Israel Chemical

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Limited. And I don't know what they did with it.
Q. Now, with respect to the number of directors who were from the government—
A. Well, government employees.
Q. Government employees. Is it true that they never represented a majority of the total number of directors on the board at any time?
A. I would say that, in most cases, they did not represent a majority.
Q. Can you ever remember a specific case where the majority of the board of directors were government employees?
A. I remember that we had a period of time where we didn't have sufficient numbers, and the company operates under different procedure.
Q. When was that?
A. I cannot give you specific dates, but we—there was times that we didn't have a quorum because—

19 Q. Didn't have a quorum.

* * *

24 THE WITNESS: Because the government did not
25 approve certain directors, not necessarily government
26 employee directors. And we operated under the general

Page 63

1 assembly procedure.
2 BY DAVID SIEGEL: Q. Okay. Let's talk about a
3 little bit more this procedure of how the board is
4 constituted. You just made a reference to the government
5 not approving certain directors. Are you testifying that
6 every person who served as a director on the board had to
go
7 through a government approval process?
8 A. Yes.

* * *

18 BY DAVID SIEGEL: Q. How were board members
or
19 potential board members selected or identified for
20 presentation to the government for approval?
21 A. I—I don't know. I can tell you that some of
22 them were ICL employees, some of them were government
23 employees. But how and who selects, I have no idea. I
can
24 tell you that it requires the signature of two ministers for
25 each director nomination.
26 MR. BREM: I'm sorry. I didn't hear the last.

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1 thing he said.
2 MR. BRANDT: Requires two signatures.
3 THE WITNESS: Two ministers. The Minister of
4 Finance and the Minister of Industry and Trade must
approve
5 the nomination.

* * *

22 BY DAVID SIEGEL: Q. Okay. This procedure that
23 you talked about of going to the government with a grant
24 proposal, do you know if the Israel government gave grants
25 to companies who were not government companies during
that
26 time frame?

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1 A. Yes.

* * *

10 Q. Okay. After December of 1991, what was your next
11 duty with the Bromine Group of Companies?
12 A. Okay. I came back January 1st of 1993. And I—
13 my position was marketing manager of the inorganics
14 products.

* * *

26 BY DAVID SIEGEL: Q. Okay. When you began

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1 working again in 1993, January, as marketing manager of
2 inorganic products, where were you based?
3 A. Beer Sheva.
4 Q. And what did your duties in that job consist of?
5 A. To prepare and execute a marketing program with
6 the product group and to promote usage of our products
and
7 to increase the basket of products that we were producing.
8 Q. How long did you have that job?
9 A. For two years.

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5 A. Yes.
6 Q. Can you think of a specific instance of a product
7 that you isolated to add to the mix during your tenure?
8 A. Yes. We added a product by the name of lithium
9 bromide.
10 Q. Now, when you decided to add lithium bromide to

the group of products that the company was producing —
A. Will produce it. We did not produce it at that time.
Q. Yeah. When you decided to add it to the group that you would be producing, did you have to consult with anyone in the government to add a new product line?
A. No.

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Q. Now, in your capacity as marketing manager, how— what was your involvement with pricing?
A. Prices were determined among other.
Q. Among others by you?
A. Yes.
Q. Did the government have any input in the pricing function—
A. No.
Q. —of the company products?
so that if you wanted to give a price concession to a particular customer, you were completely free to do that without getting any sort of government approval?
A. Yes.

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Q. What did you do after January 1st, 1995, with the company?
A. I was nominated as a strategic business unit manager, which is equivalent to vice president, for inorganics product. And since I didn't like the name, I change it. And my cards read "Vice President, Industrial Chemicals."
Q. So you didn't like "inorganic," and you changed it to "industrial"?
A. I didn't like the SBU.
Q. There's that word again, "nominated." What do you mean when you say nominated as vice president?
A. I got a nomination from the president of the

company, formal—
Q. The president of Dead Sea Bromine Company?
A. Yes.
Q. And you used the word there "nominated" is that equivalent to being appointed? Or did somebody have to vote?
A. He gave me the—
Q. He just made you the vice president one day?
A. Yeah.
Q. But you weren't happy with the name, so you changed it.
Is that the capacity that you're serving in still today?

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A. Yes.

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Q. Now, is it true that sometime in 1995 Dead Sea Bromine Company ceased being a government company; is that correct?
A. Sometime in 1995 ceased to be a government company? Can you be more specific?
Q. Well, did the—did there come a point in time when the State of Israel's ownership fell below 50 percent?
A. Yes.
Q. And was that sometime in '95, to your recollection?
A. Yes.

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Q. Okay. Now, earlier you testified about these labor wages, guidelines that were applicable to the company. Do you know if those similar guidelines are applicable to all Israeli companies or just government

companies?
A. I — I couldn't tell. I know that we were — we as Dead Sea or as — sorry, as Bromine Compounds Limited we are specifically named on some of them.
Q. But just — just from your general knowledge of the Israeli economy, do you know whether or not the Israeli

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government dictates wage increases for companies that are not government companies?
A. From my general knowledge, I would say that they may recommend, but cannot dictate.

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Q. Okay. With respect to government companies, could you give me your understanding of what a special state share is? If I use that phrase, does it have any meaning for you? Do you know what I'm referring to?
A. Yes, I do.

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Q. Okay. Just tell me what your understanding of it is.
MR. BRANDT: You're not asking for a legal interpretation? That's fine.
THE WITNESS: The shares that give the government unique position that is different from the amount of shares that the government owns. Actually, it gives the government the right to veto any decisions that I believe the laws specify.

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THE WITNESS: Okay. The special government share

was issued at beginning of '92. When — the government sold
the part of Israel Chemical Limited and it wanted to protect its interest, some of the ICL more-dominant companies, such
as Dead Sea Bromine.
Q. Okay. So if I understand, your testimony with respect to the Dead Sea Bromine Company Limited is that the
earliest time the Sate of Israel owned a special state share was 1992?
A. Yes.

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Q. Do you recall the cases being removed from state court in Louisiana to federal court in Louisiana?
A. Yes.
Q. Do you recall having consulted with anybody in the government about that maneuver or that tactic?
A. No.

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BY DAVID SIEGEL: Q. With respect to the prior litigation, are you aware that Dead Sea Bromine and Bromine
Compounds Limited entered into an agreement with certain of
the other defendants in the litigation concerning market share and liability for the litigation in foreign countries?
MR. BRANDT: Read back the question, please.
(Record read.)
THE WITNESS: Yes.
BY DAVID SIEGEL: Q. Okay. Now, did Dead Sea

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Bromine or Bromine Compounds Limited have to consult with

the Israeli government before entering into those agreements?
A. No.
Q. Do you recall in the earlier litigation that there came a point in time when Dead Sea Bromine voluntarily waived immunity which it might have had under the Foreign Sovereign Immunities Act in the course of that litigation?
A. Yes.
Q. Did you have to consult with the Israeli government before waiving that immunity?
A. No.
Q. And with respect to the Louisiana cases you've also waived the immunity that might have existed under the Foreign Sovereign Immunities Act; is that correct?
A. Yes.
Q. Did you have to consult or did you consult with the Israeli government in making that decision?
A. No.
Q. Now, do you recall in the course of the litigation in Texas that the Dead Sea companies entered into a settlement agreement with the plaintiffs, my clients, in that litigation?
A. I do, yes.
Q. Did you have to or did you consult with the Israeli government before entering into those settlement

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agreements?
A. No.
Q. Okay. Has in either the Texas litigation or the Louisiana — well, I suppose it would only be the Texas litigation at this point. Has Dead Sea obtained lawyers in any of the foreign countries from which the plaintiffs hail?

A. Yes.
Q. And did Dead Sea consult with the Israeli government in obtaining those lawyers?
A. No, I don't think so.
Q. Now, in addition to not having consulted with the Israeli government prior to waiving immunity, had you or anyone at Dead Sea, to your knowledge, informed the Israeli government since that time of that waiver of immunity?
A. Say it again.
Q. Have you informed anyone within the Israeli government after the waiver of immunity of having taken that action?
A. No, I don't — I didn't do it. I don't believe anybody has.

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BY DAVID SIEGEL: Q. Have you disclosed it to anyone in the government?
A. We didn't disclose it.

* * *

BY DAVID SIEGEL: Q. I'm handing you what's been marked as Exhibit 3. Can you identify that document?
A. It's Government Companies Law 5735-1975.
Q. Okay. What is that, just in layman's terms? Is this the Government Companies Law that defines what a government company is?
A. I think this law regulates —
Q. Among other things.
MR. BRANDT: Among other things.
THE WITNESS: Yes.
MR. BRANDT: David, is it acceptable to you if the witness refers to the version in Hebrew?
DAVID SIEGEL: Yeah.
BY DAVID SIEGEL: Q. Now, I've just — I've just extracted a couple pages of it. We're not looking at the

entire law. But if you'll look at paragraph 4(a) which — on the Hebrew version I don't know if it's on the first page or the second page. Have you found it?
A. Yes.

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Q. Okay. Could you just read that, please? Well, that's not going to work, is it?
MR. PADEN: On the record? On the record?
BY DAVID SIEGEL: Q. Read it in English.
A. You couldn't find smaller letters?
"A Government company shall act in accordance with the business considerations by which a non-Government company is normally guided, unless the Government, with the approval of the Committee, prescribes other considerations for acting. This provision shall not apply to a Government company the basic documents of which prohibit the distribution of profits."
Q. Okay. What is your understanding of what that provision that you just read means?
MR. BRANDT: His layman's interpretation? Yes?
BY DAVID SIEGEL: Q. Yeah. Before you answer it, I'll just say on the record that, whenever I ask you a question like that, I fully understand that you're not a lawyer. So I'm not asking you for your lawyer's understanding. I'm asking you for your understanding.
MR. BRANDT: Okay. That's fine.
THE WITNESS: Now, can you repeat the question again.
BY DAVID SIEGEL: Q. What is your understanding of what that provision that you just read means, paragraph 4(a)?

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A. It means that a government-owned company should conduct business similar to a nongovernment-owned

company
when it comes to business, unless if the government decides
for its own reason and it has other consideration to act differently.
Q. Would it be fair to say, given that paragraph, then, that the primary objective of Dead Sea Bromine and Bromine Compounds is to make a profit?
A. Among other things.
Q. What other objectives would you include?
A. To develop the natural resources of the Dead Sea, to sell as much more as we can and to sell as much profit as
we can.
Q. Now, how is developing the natural resources of the Dead Sea a distinct consideration from selling products? I mean, does developing the natural resources have any value separate and apart from the fact that you can
then take them and sell them?
A. I believe the concept is to develop in Israel—although you can take the bromine and develop an industry out of Israel. The concept is to develop a business in Israel rather than an outside business.
Q. That would almost go without saying since the Dead Sea is located in Israel, isn't it?
MR. BRANDT: No, they—
BY DAVID SIEGEL: Q. There's no—obviously,

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there's no prohibition against doing business all over the world. And you've testified that Dead Sea Bromine has worldwide markets; is that correct?
A. Yes.
Q. Okay. So what do you mean when you say develop a business inside of Israel?
A. We spend a lot of money on R and D and other

processes. In theory, you can take the raw material, which is bromine, and ship it to Cyprus or whatever and develop the industry there. We want to utilize all what we invest and the bromine mostly in Israel to make the—to develop it in Israel.
Q. Okay. So the developmental phase, which might include R and D or dreaming up new product lines or new applications for the raw materials, those types of activities take place in Israel?
A. And the actual fulfillment of those activities.
Q. Okay. What do you mean when you say "fulfillment"?
A. To have the actual production.
Q. Okay. So there's a lot of production in Israel?
A. Correct.

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Q. Okay. And when you say that one of the primary objectives is to make a profit, would it be fair to say that the State of Israel—and I mean the government of Israel —doesn't have any particular interest in how that profit is generated in terms of choosing between product lines?
A. Again, I believe that they would like us to have the highest added value in Israel. And as a by-product, we have most of the profit generated by an Israeli production.
Q. Okay.
A. To tell you whether they favor one product line over another, I don't know.
Q. There would be—can you think of any reason, for example, why the government of Israel would have an interest in Dead Sea preferencing the flame retardant market as opposed to the agricultural chemical market?
MR. BRANDT: Object to the form of the question as calling for this witness to speculate as to what a government might think or do.

BY DAVID SIEGEL: Q. You can answer.
MR. BRANDT: You're free to answer if you can

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answer.
THE WITNESS: I don't know.
BY DAVID SIEGEL: Q. Okay. Well, let me ask you this. In all of your experience in working for these companies, did any government minister ever come to you and say, "I want this product line developed"?
A. No.

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Q. Okay. Now, if Dead Sea Bromine or Bromine Compounds are sued in ordinary lawsuits, not necessarily by shareholders, but any lawsuit that might be filed by an Israeli citizen against these companies in Israel, if a judgment is taken against one of these companies, does the government of Israel pay that judgment, or does the company pay it?
A. The company is paying it.
Q. To your knowledge, has Dead Sea Bromine or Bromine Compounds ever claimed any sort of governmental immunity in a lawsuit filed against it in Israel of any type?
A. I'm not aware of it.

* * *

BY DAVID SIEGEL: Q. Okay. If you'll look at what I've marked as Exhibit Number 4, can you identify this document?
A. It says, "The State of Israel, Ministry of

Finance, the Government Companies Authority, Jerusalem, the

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Committee for the Appointment of Legal Advisors for Government Companies."
Q. Okay. Now, I realize that this is March of 1971.
A. Right.
Q. And this predates your involvement with the company. I'm just using this as a representative example, because it talks about a subject that I want to ask you questions about. And that is how legal advisors for the company are appointed. This is a letter from the Ministry of Finance to the company. And it says that "The committee for the appointment of legal advisers for government companies has decided to approve the appointment of . . ." the lawyers. Is this procedure still followed—well, strike that.

Throughout your tenure with the company from 1976 to the present, is this the procedure for how legal advisers are selected and appointed?
A. Yes.

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What would happen, in your experience, if the company selected a law firm and the government didn't give its approval for that law firm?
MR. BRANDT: Are you asking in his experience has that happened?
BY DAVID SIEGEL: Q. Yeah. Has that happened?

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A. To the best of my knowledge, it did not happen.
Q. Okay. So as far as you know, every time the company selected a set of legal advisers and presented it to

the government for approval, it was approved?
A. I would say it's a little different. There was an attempt, request to change the legal advisers. And the company went through the procedure to change this—
Q. Request.
A. —request and was successful.
Q. The company was ultimately successful?
A. Yes.
Q. So the result was that the company got the legal advisers that it wanted in the final—
A. Yes.

* * *

BY DAVID SIEGEL: Q. Okay. Would you—could you identify what I've marked as Exhibit Number 5?
A. It states, "The State of Israel, the Government Companies Authority, the Director of the Authority, the Ministry of Finance, Jerusalem," February 3rd, 1993. The issue was "Bonus Policy in Commercial Government Companies."
Q. Okay. Do you recall having reviewed this document sometime in February of '93? Would—would this have been a document that you would have seen at the time?

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A. I would know if it existed, yes.
Q. Okay. What is a commercial government company? Is that a separate classification from noncommercial government companies?
A. Yes.
Q. Okay. What is the significance of the difference?
A. I think it's the previous document that was a reference to nonprofit companies. This is a profit-oriented company.

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Q. Well, I'm trying to define the process how it is

determined that a certain individual will get a bonus. If the board wants to pay a bonus to a certain individual, does it have to get approval from the Ministry of Finance to pay that bonus?
A. The ministry determine the rules, actually, the amounts and some basic rules to be followed. The board adopt it and provide management with more specific instruction.
Q. Okay.
A. Then management goes and decide.

* * *

BY DAVID SIEGEL: Q. Okay. I'll ask you to look at what I've had marked as Exhibit Number 6 and identify

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that document for me.
A. "The Government Secretariat, Jerusalem," February 22nd, 1984. It's "To: Members of the Government, From: The Deputy Secretary to the Government." And the item is "Giving Priority to Purchasing Israeli Products."

* * *

Q. Okay. I'm picking it up sort of in the middle of the paragraph. It says, ". . . these bodies shall give priority to purchasing Israeli products over imported products for so long as the quality and price of the local product comply with the criteria that have been determined . . . ."
Now, what does that mean when it says it's okay to buy—it's actually preferential to buy Israeli products as "long as the quality and price comply with the criteria that have been determined"?

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A. For example, in 2(a) it states that even if the price is by 15 percent higher than the imports, the—most likely the combination will be to still buy it made in

Israel.
Q. Provided that the quality of goods is equal?
A. Is equal, right.
Q. Now, who would make the determination as to whether or not the quality of the goods would be equal?
A. It's a tough question.
Q. Tough question.
A. Right.
Q. Would the company be involved in that determination?
A. Yes.
Q. Together with the government?
A. Yes.
Q. During your tenure with the Dead Sea companies, was this—was this a big issue? Was—was Dead Sea a large purchaser of products that were required for its business?
A. Yes.
Q. Did Dead Sea oftentimes purchase products from overseas rather than Israeli products?

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A. Yes.
Q. And in order to do that, you had to go to the government and convince them that certain conditions were apparent?
A. Correct.
Q. Okay. And was that ever part of your primary job—
A. Yes.
Q. —responsibility?
What time—what position was that that you were responsible for these things?
A. When I was head of finance.
Q. Okay. And what types of arguments would you make to the government for buying overseas products rather than

Israeli products?
A. In a specific case, the product required some foreign government approvals as far as the shipments, et cetera. And we claimed that, the Israeli company, it will take it too long to obtain such approvals, and we couldn't wait. So we asked them to approve the purchase of the foreign products for this reason. And it was granted.
Q. And that was granted?
A. Yes.
Q. Can you remember any other examples?
A. Yes. There was another example that we purchased some electrical equipments that were produced in Israel.

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And in this case the government told us, "You're going to buy Israeli-made."
Q. What was the alternative in that case?
A. To import it from—from Europe.
Q. And what was the result in that particular case?
A. That we bought it—we bought Israeli-made equipments.
Q. And you had argued to the government that you wanted to buy the European product?
A. Yes.
Q. And why did they say you had to buy the Israeli product?
A. They claimed that the Israeli company imports a fair amount of equipments from the same company. So it's virtually the same they imported.
Q. So you were actually purchasing from another Israeli company which had itself bought it on the—from the Europeans?
A. Part of the equipments were bought—of the component were purchased from a different source, but they put it together in Israel.
Q. Okay.

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Q. So if the company wanted to go purchase a piece of land for seven hundred thousand dollars, it could do so without any government approval?
A. It will require board approval, but not government approval.

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Q. Can you identify that document?
A. It says the "Directives of the Attorney-General Work Procedures, Resolution of Disputes Between a Government Company and Another Government Body."
Q. Okay. Do you want to take just a minute to review that.
(Interval.)
A. Yes. Okay.
Q. Okay. If you'll look at paragraph numbered 1 on

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the first page of that document, it says, "One should, as far as possible, avoid litigation in the courts for the purposes of resolving legal disputes in civil matters between a government company and the state . . ." and then it goes on.
Is it your understanding that it would have been possible or it is possible for a government company to sue the state if a dispute arose between them?
A. I don't know what you mean by "to sue."
Q. To file a lawsuit in a — in a court against the government.
A. Here we have procedures that tells you what — how a government-owned company should react.
Q. Right. And the sentence I just read says, as far as it's possible, you should try to avoid litigation. Now, my question is, can you infer from that that, if all of

these other methods don't work, that litigation is permitted?
A. I believe that if you didn't find all the solution, there may be cases where you can.

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Q. Okay. Dead Sea employees are not employees of the State of Israel, are they?
A. Correct.
Q. They do not receive a paycheck from the State of Israel?
A. Correct.

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Q. When a Dead Sea — when your secretary reports to work each day, she does not get any type of instruction from the State of Israel?
A. No.
Q. Do you?
A. No.

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Q. But do you mean to say that what Mr. Grinbaum does every day—
A. No.
Q. —in—in trying to maximize Dead Sea's profit and run the company—
A. No.
Q. —is determined by somebody in government?
A. No. This is—definitely not.

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Q. At any point in time in the past has there been a single employee in either Dead Sea Bromine Company or Bromine Compounds who was told what to do on a daily basis

or on a yearly basis by someone in the government?
MR. BRANDT: Other than what he's described in terms of the general parameters of the statute?
CHARLES SIEGEL: Well, other than nothing, because I haven't heard anything described other than what the statute says.
MR. BRANDT: All right. That's fine. As long as we have that understanding.
THE WITNESS: I don't believe so.

* * *

I think your earlier testimony was that Dead Sea Bromine Company was founded in 1955; is that correct?
A. Correct.
Q. At that time who was its—who owned Dead Sea Bromine Company?
A. I—I believe Dead Sea Works.
Q. And who owned Dead Sea Works at that time?
A. I can't—it was owned ultimately by the government. But I cannot tell you exactly through what—

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Is it your testimony that Dead Sea Bromine Company was ultimately owned by the government from its founding in
1955 up until 1995?
A. Yes.
Q. Okay. Now, are you familiar—and the same would be true for Bromine Compounds?
A. Yes.

FILED
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Nos. 01-593, 01-594

IN THE

Supreme Court of the United States

DOLE FOOD COMPANY, *et al.*,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

DEAD SEA BROMINE CO., LTD., *et al*,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 provides comprehensive rules governing suits against foreign governments and their agencies or instrumentalities. This statute defines the term "agency or instrumentality of a foreign state" to include any entity incorporated in a foreign country "a majority of whose shares or other ownership interest is owned" by the government of that country. 28 U.S.C. § 1603(b)(2). The petitioners in No. 01-594, Dead Sea Bromine Co., Ltd. and Bromine Compounds Limited, are incorporated in Israel and were indirectly owned by the Israeli government through their parent corporations at the time of the conduct at issue in this suit. This case presents the following questions:

1. Whether a corporation is an "agency or instrumentality" if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation.

2. Whether a corporation is an "agency or instrumentality" if a foreign state owned a majority of the shares of the corporation at the time of events giving rise to litigation, but the foreign state does not own a majority of those shares at the time that a plaintiff commences suit against the corporation.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

In the proceedings below, the plaintiffs-appellants were respondents Gerardo Dennis Patrickson, Rodolfo Bermudez Arias, Benigno Torres Hernandez, Fernando Jiminez Arias, Santos Leandros, Herman Romero Aguilar, Elias Espinoza Merelo, Hooker Era Celestino, Alirio Manuel Mendez, and Carlos Humberto Rivera.

The defendants-appellees were the petitioners in No. 01-593: Dole Food Company, Inc., Dole Fresh Fruit Company, Dole Fresh Fruit International, Inc., Dole Fresh Fruit International, Ltd., Pineapple Growers Association of Hawaii, AMVAC Chemical Corporation, Shell Oil Company, The Dow Chemical Company, Occidental Chemical Corporation, Standard Fruit Company, Standard Fruit and Steamship Company, Standard Fruit Company de Costa Rica, S.A., Standard Fruit Company de Honduras, S.A., Chiquita Brands, Inc., Chiquita Brands International, Inc., Maritrop Trading Corporation, Del Monte Fresh Produce N.A., Inc., Del Monte Fresh Produce Hawaii, Inc., Del Monte Fresh Produce Company, and Fresh Del Monte Produce N.V. (incorrectly sued below as Fresh Del Monte, N.V.).

The third-party defendants/cross-appellants were the petitioners in No. 01-594: Dead Sea Bromine Co., Ltd., and Bromine Compounds Limited.

Page ii of the petition in No. 01-594 contains a corporate disclosure statement for Dead Sea Bromine Co., Ltd., and Bromine Compounds Limited. Pages ii-iv of the petition in No. 01-594 contain a corporate disclosure statement for the Dole Petitioners. This latter statement remains correct but for one exception: there is no longer any publicly held corporation that owns 10% or more of the stock of Chiquita Brands International, Inc.

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BRIEF FOR THE DOLE PETITIONERS[1]

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 251 F.3d 795. The opinion of the district court (Pet. App. 24a-78a) is unreported.

JURISDICTION

The decision of the court of appeals was entered on May 30, 2001. A petition for rehearing was denied on July 10, 2001. The petition for a writ of certiorari was filed on October 5, 2001. On June 28, 2002, the petition in this case was granted, and this case was consolidated with No. 01-594. This Court has jurisdiction over this matter under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Foreign Sovereign Immunities Act defines the term "agency or instrumentality of a foreign state" to mean any entity —

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or

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[1] The "Dole Petitioners" are the petitioners in No. 01-593: Dole Food Company, Inc., Dole Fresh Fruit Company, Dole Fresh Fruit International, Inc., Dole Fresh Fruit International, Ltd., Pineapple Growers Association of Hawaii, Standard Fruit Company, Standard Fruit and Steamship Company, Standard Fruit Company de Costa Rica, S.A., Standard Fruit Company de Honduras, S.A., AMVAC Chemical Corporation, Shell Oil Company, The Dow Chemical Company, Occidental Chemical Corporation, Chiquita Brands, Inc., Chiquita Brands International, Inc., Maritrop Trading Corporation, Del Monte Fresh Produce N.A., Inc., Del Monte Fresh Produce Hawaii, Inc., Del Monte Fresh Produce Company, and Fresh Del Monte Produce N.V.

> other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in Section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b); *see also id.* § 1603(a) (defining a foreign state to "include[] a political subdivision of a foreign state or an agency or instrumentality of a foreign state"). The Foreign Sovereign Immunities Act is reprinted in full in the petition in No. 01-593 at Pet. App. 108a-25a.[2]

STATEMENT

The Foreign Sovereign Immunities Act (the "FSIA" or the "Act"), 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11, provides comprehensive rules for suits against foreign governments and their affiliated entities. These rules govern the availability of foreign sovereign immunity, jurisdiction over suits involving foreign governments and their entities, as well as the procedures for such suits. *See, e.g., Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488, 495 n.22 (1983). In this case, two corporations — Dead Sea Bromine Co., Ltd. and Bromine Compounds Limited (the "Dead Sea Companies") — that plaintiffs themselves have described as "*majority-owned by the State of Israel*"[3] attempted to invoke the procedural protections that the Act affords to agencies or instrumentalities of foreign governments. However, because the State of Israel owned these companies indirectly through their corporate parents, the lower court held that neither could

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[2] Since the filing of the petition, there have been two minor amendments to the Act that are irrelevant to the issues here. *See* Pub. L. No. 107-117, § 208 (2002) (amending 28 U.S.C. § 1605(a)(7)(A)); Pub. L. No. 107-77, § 626(c) (2001) (same). The current version of the provision affected by these amendments is included in the addendum to this brief at Add. 1a-2a.

[3] Brief of Plaintiffs-Appellants/Cross-Appellees at 7, *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001) (Nos. 99-16524 & 99-16770) (emphasis added).

qualify as an entity "a majority of whose shares or other ownership interest is owned by a foreign state" under the FSIA's definition of agency or instrumentality. 28 U.S.C. § 1603(b)(2). Accordingly, this case presents the question whether indirect ownership can satisfy the definition's majority ownership requirement. In addition, this Court has ordered the parties to address whether the Dead Sea Companies lost the protections afforded agencies or instrumentalities because of their privatization more than a decade after the conduct at issue in this suit.

The Foreign Sovereign Immunities Act — The FSIA was designed "to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." Letter from Robert S. Ingersoll & Harold R. Tyler to Carl O. Albert, October 31, 1975, *reprinted in* H.R. Rep. No. 94-1487, at 45 (1976) [hereinafter "Ingersoll Letter"]. Although for many years foreign governments were treated as absolutely immune from suit, *see Verlinden*, 461 U.S. at 486; *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.), in 1952 the State Department adopted the so-called "restrictive theory" of sovereign immunity, under which "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." Letter from Jack B. Tate to Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984 (1952); *see also Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-35 (1945) (deferring to the State Department's suggestions on foreign sovereign immunity). Application of the restrictive theory proved troublesome for the State Department because, among other things, foreign governments began to seek "suggestions of immunity" from the Department through application of diplomatic pressure. *See Verlinden*, 461 U.S. at 487-88; *see generally* Michael Sandler *et al.*, *Sovereign Immunity Decisions of the Department of State: May 1952 to January 1977*, *reprinted in*

John A. Boyd, *Digest of United States Practice in International Law* 1017, 1018-19 (1977). Accordingly, in 1975, the State Department and Department of Justice proposed to Congress a bill "leaving sovereign immunity decisions exclusively to the courts" and "discontinuing the practice of judicial deference to 'suggestions of immunity' from the Executive Branch." *Foreign Sovereign Immunities Act of 1975: Section-by-Section Analysis* 1 (1975) [hereinafter "*FSIA Section-by-Section Analysis*"].[4] With a few minor amendments not relevant here, *see* H.R. Rep. No. 94-1487, at 10-11 (1976), this bill became the FSIA.

In transferring responsibility for determining foreign sovereign immunity to the courts, the FSIA codified and refined the restrictive theory of foreign sovereign immunity. Specifically, the Act provides that foreign states are generally immune from suit, *see* 28 U.S.C. § 1604, but enumerates a number of exceptions to that general rule, *see id.* § 1605(a), (b) & (d), including cases in which foreign states waive their immunity by contract or treaty, commit ordinary torts in the United States, or engage in "commercial activity" substantially related to the United States. *Id.* §§ 1605(a)(2) & (a)(5). A similar presumption and set of exceptions govern the immunity of foreign states from attachment of, and execution on, their property. *See id.* §§ 1609-11. The FSIA also provides procedures for serving process on foreign governments, and it authorizes courts to exercise personal jurisdiction over them based upon such service. *See id.* §§ 1330(b), 1608(a); *see generally* Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 Stan. L. Rev. 385, 396-410 (1982) (noting that the FSIA's service and personal jurisdiction provisions permitted abolition of the diplomatically irritating practice of attaching property to obtain jurisdiction over foreign sovereigns).

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[4] Most portions of this section-by-section analysis are reprinted verbatim in the House and Senate reports on the FSIA. *See* H.R. Rep. No. 94-1487, at 12-33 (1976); S. Rep. No. 94-1310, at 11-32 (1976).

The FSIA also provides comprehensive procedures for cases in which claims are asserted against foreign governments, including protections for foreign governments when they are not immune from suit. In view of the "potential sensitivity of actions against foreign states," *FSIA Section-by-Section Analysis* 2, *reprinted in* H.R. Rep. No. 94-1487, at 13, the Act confers upon federal courts original jurisdiction "without regard to amount in controversy" over suits against foreign governments that are not barred by immunity, 28 U.S.C. § 1330(a), and it permits foreign governments to remove civil actions involving them, whether barred by sovereign immunity or not, to federal court "at any time for cause shown." *Id.* § 1441(d).

In addition, the FSIA provides foreign governments with many procedural protections enjoyed by the federal government in suits against it. Like the federal government, foreign governments are not liable for punitive damages, and they are not subject to jury trials in cases commenced in federal court or removed by them to federal court. *Compare id.* §§ 1303(a), 1441(d) & 1606 *with id.* §§ 2402 & 2674. The Act also contains provisions concerning default judgments, answers, and venue that are similar to those applicable to the federal government. *Compare id.* § 1391(f) (venue), *id.* § 1608(d) (answer), *and id.* § 1608(e) (default judgments) *with id.* § 1391(e) (venue), Fed. R. Civ. P. 12(a) (answer), *and* Fed. R. Civ. P. 55(e) (default judgments).

The FSIA extends some of the immunities and other protections it affords to foreign governments to their agencies and instrumentalities by defining the term "foreign state" to include such entities. *See* 28 U.S.C. § 1603(a). The Act in turn defines an agency or instrumentality of a foreign state to be any entity that is (1) a separate legal entity, (2) "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," and (3) neither a citizen of the United States nor created under the laws of a

third country. *Id.* § 1603(b). However, the immunities and other protections that the Act extends to agencies or instrumentalities of foreign governments are not as extensive as those afforded to foreign governments themselves. For example, the Act does not afford agencies or instrumentalities any protection against punitive damages, *see id.* § 1606, and it narrows the immunities afforded them from suit and from execution. *See id.* §§ 1605(a)(3), 1610(b). In addition, the Act subjects agencies or instrumentalities to service and venue provisions similar to those applicable to ordinary corporations. *Compare id.* § 1391(f) (venue) *and id.* § 1608(b)(2) (service) *with id.* § 1391(c) (venue) *and* Fed. R. Civ. P. 4(d)(3) (process).

The Dead Sea Companies — The Dead Sea, a landlocked salt lake located between Israel and Jordan, is rich in bromine, magnesium, potassium, and other valuable minerals. 8 *Encyclopedia Americana* 551 (1999). Since 1961, the Israeli government has given a company incorporated by it, Dead Sea Works, Ltd., the exclusive right to mine, quarry, and otherwise extract the minerals in and beneath the Dead Sea. J.A. 127. In turn, Dead Sea Works has given one of its subsidiaries, Dead Sea Bromine Co., Ltd., the exclusive right to obtain bromine and bromine compounds from the Dead Sea. J.A. 155-56. These chemicals are both sold by Dead Sea Bromine in their elemental form and fabricated into other chemical compounds by its subsidiary, Bromine Compounds, Ltd. J.A. 70.

Because the Dead Sea is one of the most important (and relatively few) natural resources in Israel, the Israeli government has exercised close control over the exploitation of the Dead Sea's mineral resources. From at least the late 1960s through the early 1990s, the Israeli government exercised this control through ownership of a multi-tiered corporate enterprise. Up until 1975, Israel held over 99% of the shares in Dead Sea Works, which in turn held over 99% of the shares of Dead Sea Bromine. J.A. 71-72, 86, 95. In 1975,

the Israeli government transferred its shares in Dead Sea Works to Israel Chemicals, Ltd., a company that the Israeli government wholly owned. J.A. 82. Since that time, Israel Chemicals, Ltd. has owned at least 88% of the shares in Dead Sea Works. J.A. 82, 95. Accordingly, as depicted in the first fold-out chart in the addendum, Add. 3a, through Dead Sea Works and later Israel Chemicals, from the late 1960s to the early 1990s Israel owned between 88% and 99% of the shares of Dead Sea Bromine. Although the ownership structure of Bromine Compounds was more complex, as depicted in the other chart in the addendum, Add. 4a, during the same period Israel owned between 66% and 88% of the company's shares through its corporate parents. J.A. 86-88, 92-94.

When Israel owned the Dead Sea Companies, those companies qualified as "government subsidiary companies" under Israeli law because the government had the power to appoint a majority of both their boards. J.A. 75, 177. As a consequence, the Dead Sea Companies were subject to special government regulation and oversight, which Israel actively exercised by, among other things, appointing representatives to the companies' boards, monitoring board meetings, establishing audit procedures, and reviewing budgets, plans, and operations. Pet. App. 22a; J.A. 76-79, 175-222. Moreover, when the Israeli government began privatizing the Dead Sea enterprise in 1992, the articles of association of the Dead Sea Companies were amended to give Israel a "Special State Share" requiring the government's consent to any reorganization of the companies or sale of a substantial block of their stock. J.A. 73-74, 104-09, 118-23; *see also* J.A. 107-08, 121-22 (recognizing Israel's "[v]ital [i]nterests" in the management of the companies and their exploitation of the Dead Sea).

DBCP and the Litigation over its Use — While Israel owned the Dead Sea Companies, the companies produced a pesticide named dibromochloropropane ("DBCP"). J.A. 13. DBCP was widely used in the United States and around the

world through the 1970s on a variety of agricultural crops, including bananas. J.A. 26. In the late 1970s, the Dead Sea Companies sold DBCP to one of the Dole Petitioners. J.A. 13, 24. In 1979, however, the pesticide's registration in the United States was canceled for most uses following reports of infertility in factory workers producing the chemical. J.A. 33.

As detailed in the petition (Pet. 4-6), since the early 1980s, farm workers from Costa Rica, Ecuador, Guatemala, Panama, and elsewhere claiming to have been injured by exposure to DBCP in their home countries have been filing suits in this country against major fruit growers and chemical manufacturers. The first such suits were brought in Florida against domestic DBCP manufacturers and were dismissed under the doctrine of *forum non conveniens*. *See Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1217 n.5 (11th Cir. 1985) (per curiam). Undaunted, foreign plaintiffs and their lawyers have continued to file DBCP suits throughout the United States, bringing actions against growers who used DBCP as well as domestic manufacturers of the pesticide in state courts in California, Texas, Florida, Louisiana, Mississippi, and in this case, Hawaii. Most of these suits, upon removal to federal court, have been dismissed under the *forum non conveniens* doctrine. Pet. 6 n.1.

Hoping to avoid this result, many DBCP plaintiffs filed suit in state courts in Texas during a period in which the doctrine was abrogated in those courts by state statute. Based on their sales of DBCP in the late 1970s for use on banana farms in the home countries of these plaintiffs, the Dead Sea Companies were impleaded into the Texas cases. *See Delgado v. Shell Oil Co.*, 231 F.3d 165, 169-72 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001). Invoking one of the protections that the FSIA affords agencies or instrumentalities of a foreign government, the companies removed the cases to federal court, where the cases were dismissed for *forum non conveniens*. *See id.* at 172-75; *see also* 14C Charles A. Wright *et al.*, *Federal Practice & Procedure* § 3729.1, at 238-42 (3d ed.

1998) (noting that the FSIA permits a foreign state that is a third-party defendant to remove the entire case to federal court). On appeal, the Fifth Circuit affirmed, holding, *inter alia*, that the claims against the Dead Sea Companies were *bona fide* and that the companies were agencies or instrumentalities of the Israeli government by virtue of the government's ownership of them. *See* 231 F.3d at 175-76, 177-81.

Proceedings Below — In 1997, another group of farm workers from Costa Rica, Ecuador, Guatemala, and Panama (represented by certain of the counsel in the Texas cases) sued banana growers and domestic chemical manufacturers in state court in Hawaii. J.A. 1, 15-52. These plaintiffs alleged injuries from exposure to DBCP used in their home countries from the 1960s through the mid-1980s. J.A. 26-27. Once again, the Dead Sea Companies were impleaded, and they removed the case to federal court based upon their status as agencies or instrumentalities of a foreign government. Pet. App. 5a. Dole Food Company, Inc. and its subsidiaries removed on the separate ground that the plaintiffs' claims were governed by the federal common law of foreign relations. *Id.*

When the plaintiffs moved to remand, the district court found that under a prior Ninth Circuit decision, *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), the Dead Sea Companies did not qualify as agencies or instrumentalities under the FSIA because they were not directly owned by the Israeli government. Pet. App. 34a-39a. Finding, however, that the plaintiffs' claims were governed by federal common law, the district court held that it had jurisdiction and dismissed the case on *forum non conveniens* grounds. Pet. App. 77a-78a, 84a-95a.

On appeal, the Ninth Circuit reversed. In addition to holding the federal common law of foreign relations inapplicable, Pet. App. 5a-16a, the court of appeals ruled that

the Dead Sea Companies were not agencies or instrumentalities of the Israeli government because neither company qualified under *Gates* as an entity "'a majority of whose shares or other ownership interest is owned by a foreign state.'" Pet. App. 19a (quoting 28 U.S.C. § 1603(b)(2)).

In the Ninth Circuit's view, its earlier decision in *Gates* was controlling because that decision had interpreted the majority ownership requirement as "limiting an instrumentality to the first tier of ownership." Pet. App. 19a. The court of appeals also reasoned that indirect ownership of stock could not qualify as an "other ownership interest" under the FSIA because interpreting the term "other ownership interest" to cover such ownership would "make the majority-shareholder requirement superfluous." Pet. App. 20a. It therefore read the term "other ownership interest" to refer to "some other form of ownership not called shares of stock." *Id.* The court acknowledged that there was no apparent reason why federal courts should "care how a foreign government structures its ownership interests so long as it, in fact, owns a majority interest in a particular corporation." Pet. App. 20a-21a. But it concluded that "none of this matters, because *Gates* decided this question, and we are bound by its authority." Pet. App. 21a.

The decision below also considered the privatization of the Dead Sea Companies before the plaintiffs brought suit in 1997. While acknowledging that every other court to consider this issue had held that privatization does not strip an entity of the protections it enjoyed under the FSIA for conduct prior to privatization, the Ninth Circuit did not "find this question as easy." Pet. App. 17a. The court of appeals began by asserting that, by its terms, the FSIA "applies only to an entity that 'is' a foreign state at the time of the suit." *Id.* The court then went on to argue that it was unclear whether the policies of the Act would be served by extending immunity to entities that are agencies or instrumentalities at the time of the underlying

conduct. Pet. App. 17a-18a. According to the court of appeals, the FSIA attempts to avoid affronting foreign governments "by making it hard to haul them into court" and by forcing parties with claims against those governments to seek "redress through diplomatic channels." Pet. App. 18a. Because diplomatic channels may be of little help "in resolving a dispute between private parties," and because a foreign government may not be forced to appear and defend itself in a suit against a former agency, the court concluded that there is "a plausible basis for not interpreting the FSIA to apply to privatized entities." Pet. App. 18a-19a.

In so doing, the court of appeals recognized that suits against former agencies of foreign states can implicate and involve those states, but reasoned that any affront caused by such suits "will be remote and indirect if [the foreign sovereign] is not held answerable for the harm it may have caused." Pet. App. 19a. However, because the question was "a close one," and not dispositive of the case in light of its other rulings, the lower court did not resolve the question. *Id.*

SUMMARY OF ARGUMENT

Recognizing the special interest that foreign governments have in their state-owned enterprises, the Foreign Sovereign Immunities Act treats companies that are majority owned by foreign governments as agencies or instrumentalities of those governments and therefore affords them a number of procedural protections against unfair treatment. In the decision below, the Ninth Circuit held that ownership under the FSIA must be direct and suggested that privatized companies lose any protections they enjoyed under the Act for conduct prior to privatization. As the language of the Act, its purposes, and other considerations demonstrate, the FSIA does not impose such rigid and artificial restrictions.

1. Under the FSIA, a company incorporated in a foreign country may qualify as an agency or instrumentality of a foreign government if a majority of the company's "shares or

other ownership interest is owned" by the government of that country. 28 U.S.C. § 1603(b)(2). This majority ownership requirement is naturally read to encompass ownership of a company through its parent corporations. In ordinary speech, the majority shareholder in a corporation is frequently said to "own" the assets of that corporation and its subsidiaries. It is therefore quite natural to say, as this Court did in *Bangor Punta Operations, Inc. v. Bangor & Aroostoock R.R. Co.*, 417 U.S. 703 (1974), that the majority shareholder in a corporation "owns" the shares in the corporation's subsidiaries. In addition, as the word "interest" is the most general term that can be used to describe a property right, it is also natural to say that a majority shareholder in a corporation has an "ownership interest" in the subsidiaries of that corporation, especially where, as with the Dead Sea Companies, that ownership interest confers the ability to appoint the subsidiary's board of directors.

This interpretation is supported by one of the primary goals of the FSIA. The Act seeks to minimize the foreign relations problems that can arise from litigation involving foreign governments and affiliated entities by affording those parties a federal forum and other procedural protections. Drawing a distinction between direct and indirect ownership undermines this objective because a foreign government's interest in a company does not disappear when its ownership is indirect. To the contrary, countries choose to employ tiered corporate structures to ensure public control, to facilitate investment, to respond to emergencies, and for other reasons that in no way indicate a lack of interest in how those entities are treated in American courts. As a consequence, limiting the majority ownership requirement to direct ownership prevents companies in which foreign governments have a proprietary interest from enjoying the protections needed to minimize the risk of foreign affairs problems. Even worse, such a limitation may itself become a source of diplomatic friction because, in practice, it can lead to arbitrary results.

The natural reading of the majority ownership requirement is also supported by the legislative history of the Act, which shows that Congress intended the definition of agencies and instrumentalities to be applied broadly to a variety of different organizational forms. Indeed, the history specifically states that "mining enterprises," an apt description of the Dead Sea Companies, can qualify as agencies or instrumentalities under the Act. In addition, this conclusion is consistent with the treatment of companies indirectly owned by the federal government. Those companies have been consistently described and treated as agencies or instrumentalities of the United States. Because the structure of the Act evidences a congressional intent to provide foreign governments with procedural protections similar to those enjoyed by the federal government, companies indirectly owned by foreign governments should be treated as agencies or instrumentalities of those governments.

2. Although the lower court, the Solicitor General, and the respondents advance a number of arguments in favor of a distinction between direct and indirect ownership, those arguments are without merit. None of the arguments contains any serious analysis of the language of the majority ownership requirement, the purposes of the Act, or the history underlying it. Moreover, the Solicitor General's reliance on the principle of corporate separateness is misplaced because the FSIA's definition of agency or instrumentality explicitly rejects the principle and, even more importantly, because application of the principle is inconsistent with the Act's goal of protecting foreign relations.

3. A company that is majority owned by a foreign government at the time of the conduct at issue in a case does not lose the protections of the FSIA because it is privatized before suit. Although the majority ownership requirement is couched in the present tense, that fact does not determine the point in time at which the majority ownership requirement should be applied. The present tense is often used in timeless

statements such as definitions, and legislative drafters try whenever possible to use the present tense. Moreover, the context in which the majority ownership requirement is used shows that it should be applied to the time of the conduct underlying a suit, not the time of filing. Status-based immunities such as sovereign immunity are normally applied to the time of the conduct underlying a claim. As the majority ownership requirement determines whether companies are eligible for immunity and related protections under the FSIA, the requirement should be applied to privatized companies in the same manner.

Following this traditional practice would serve the FSIA's goal of minimizing foreign relations disruptions because foreign governments do not lose all interest in a company once that company is privatized. Indeed, foreign governments may in some circumstances be the real parties in interest in suits concerning the conduct of their agencies or instrumentalities before privatization. Accordingly, parties should not be stripped of the protections of the FSIA simply because they have been privatized prior to the filing of suit.

ARGUMENT

I. COMPANIES INDIRECTLY OWNED BY FOREIGN GOVERNMENTS THROUGH THEIR CORPORATE PARENTS CAN QUALIFY AS AGENCIES OR INSTRUMENTALITIES UNDER THE FSIA

Although the decision below acknowledged that the Dead Sea Companies were majority-owned by the Israeli government, it nonetheless held that they did not satisfy the majority ownership requirement in the Foreign Sovereign Immunities Act's definition of agency or instrumentality because Israel owned the companies indirectly through their corporate parents. The majority ownership requirement, however, "draws no distinction between direct and indirect ownership." *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th

Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001). It simply requires a foreign government to "own[]" a majority of the "shares or other ownership interest" in the company in question. 28 U.S.C. § 1603(b)(2). This simple, non-technical language is more than broad enough to encompass indirect ownership of a company through the company's parent corporations. Moreover, the general purposes of the FSIA, its legislative history, and the treatment of companies owned by the federal government all support this interpretation.

A. The FSIA's Majority Ownwership Requirement Is Naturally Read to Include Companies Majority Owned by a Foreign Government through their Parent Corporations

"'[T]he starting point for interpreting a statute is the language of the statute itself.'" *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 25 (1989) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Here, the relevant statutory language defines the term "agency or instrumentality of a foreign state" to mean any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). It is undisputed that the Dead Sea Companies are corporations created under the laws of Israel and that the Israeli government owned a majority of the companies through their corporate parents at the time of the conduct at issue in this case. Pet. App. 16a, 30a. As a

consequence, the issue before the Court is whether the second prong of the definition of the term "agency or instrumentality of a foreign state," the majority ownership requirement, is satisfied by indirect ownership of a majority of a company through its corporate parents. As demonstrated below, the language of the requirement is naturally read to encompass such ownership.

1. In Ordinary Speech, the Majority Shareholder in a Corporation Is Said to "Own" the Subsidiaries of that Corporation

As this Court has admonished, courts must "give the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (quotations omitted). Because the word "own" in the majority ownership requirement is not defined by the FSIA and does not have any settled technical meaning, it must be interpreted "in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). Under such an interpretation, the majority ownership requirement can be satisfied by indirect ownership because in ordinary speech a foreign government can "own" a company by holding the shares of the company's corporate parents.

In common parlance, the shareholders of a corporation are frequently said to own the assets of the corporation, including the subsidiaries of those corporations. The Court has recognized that in "common speech" the shareholders of a corporation "would be called owners" of a ship owned by the corporation. *Flink v. Paladini*, 279 U.S. 59, 63 (1929) (Holmes, J.); *see also* 1 *Fletcher's Cyclopedia of the Law of Private Corporations* § 43, at 733-34 (perm. ed. rev. vol. 1999) ("The holding company may be regarded as the 'owner' of the subsidiary's property . . . ."). Moreover, because a subsidiary of a corporation is an asset of that corporation, the majority shareholder in a parent corporation is often said to

"own" the subsidiaries — both direct and indirect — of the parent. Examples of this usage can be found in the press,[5] legislation,[6] briefs submitted to this Court,[7] and judicial opinions.[8] In fact, it is so natural to say that a shareholder of

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[5] *See, e.g.*, Laura M. Holson, *These Guys Got Game: An Empire in the Making*, N.Y. Times, Nov. 11, 2001, § 3, at 1 ("Through its subsidiaries, A.E.G. *owns* 60 percent of the Staples arena.") (emphasis added); Judith Valente, *Grand Met Sets Sale of Alpo Unit to Nestle SA*, Wall St. J., Sept. 20, 1994, § A, at 18 ("The Swiss food conglomerate, through its subsidiary Nestle USA, already *owns* Friskies PetCare.") (emphasis added); Jennifer Bowles, *"Debt"; A Game Show for the Credit-Card '90s*, The Washington Post, July 6, 1997, § B, at 3 ("The show is *owned* by The Walt Disney Co. through its subsidiary, Buena Vista Television.") (emphasis added). The same usage is also found in the English press. *See, e.g.*, *Doubts over Murdoch Bid for Satellite Company*, Fin. News (London), Oct. 29, 2001, *available at* 2001 WL 12508516 ("General Motors (GM), the car manufacturer . . . *owns* DirecTV through its subsidiary Hughes Electronics.") (emphasis added); *News Summaries*, The Economist, Feb. 10, 2001, at 2 ("DirecTV, an American satellite-TV company *owned* by General Motors through its Hughes subsidiary") (emphasis added).

[6] *See, e.g.*, Government Corporation Control Act, Pub. L. No. 79-248, Title I, § 101, 59 Stat. 597, 597-98 (1945) (describing subsidiaries of the Reconstruction Finance Corporation such as the "Defendant Plant Corporation; Defense Supplies Corporation; Metals Reserve Company; Rubber Reserve Company; War Damage Corporation" and "RFC Mortgage Corporation" as "wholly owned Government corporation[s]"); 5 U.S.C. App. 1, Reorganization Plan No. 22 of 1950 (message of the President describing Federal National Mortgage Association, a subsidiary of the government-owned Reconstruction Finance Corporation, as a "wholly owned Government corporation").

[7] *See, e.g.*, Brief *Amicus Curiae* of Media Entities and Organizations in Support of Respondents at 1a, *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (Nos. 99-1687 & 99-1728) (noting that ABC, Inc. "owns, alone or through its subsidiaries, the ABC Television Network, the ABC Radio Network, ten television stations, and forty-five radio statutes").

[8] *See, e.g.*, *In re Navarre Corp. Sec. Litig.*, 295 F.3d 791, 795 (8th Cir. 2002) (stating that, "[t]hrough its subsidiary, NetRadio Corporation, Navarre also *owns* and operates NetRadio Network") (emphasis added); *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1459 (9th Cir. 1995) (stating

a corporation owns the corporation's subsidiaries that, in their opening brief below, respondents themselves described the Dead Sea Companies as "majority-*owned* by the State of Israel." Brief of Plaintiffs-Appellants/Cross-Appellees at 7, *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001) (Nos. 99-16524 & 99-16770) (emphasis added).

Significantly, the United States government has described itself as the "owner" of the subsidiaries of the Reconstruction Finance Corporation (RFC), a corporation whose shares the government held. In 1945, in the *Reference Manual on Government Corporations*, the General Accounting Office surveyed existing government corporations, including their ownership and capital stock. Even though the RFC had "subscribed and paid for all of the capital stock" of at least six corporations, *see* Gen. Accounting Office, *Reference Manual of Government Corporations* 34, 40, 171, 214, 227, 280 (discussing the Defense Plant Corporation, Defense Supplies Corporation, Metals Reserve Corporation, RFC Mortgage Corporation, Rubber Reserve Company, and War Damage Corporation), the *Reference Manual* states that each of these corporations was "*owned* by the United States." *Id.* at 32-33 (Defense Plant Corporation) (emphasis added); *see also id.* at 39 (noting that the Defense Supplies Corporation "was owned by the United States"); *id.* at 170 (noting that the Metals Reserve Corporation "was owned by the United States"); *id.* at 183 (noting that the Petroleum Reserves Corporation, though a "subsidiary of the Reconstruction Finance Corporation," is "owned by the United States"); *id.* at 213 (noting that the RFC Mortgage Company was "owned by the United States through ownership of its stock by the

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that Fletcher Fine Foods was "parent to a number of subsidiaries, and through these subsidiaries *owned* Golden Gate Fresh Foods ('GGFF')," and that Fletcher Fine Foods "*owned* GGFF") (emphasis added); *Estate of Soler v. Rodriguez*, 63 F.3d 45, 47 (1st Cir. 1995) (noting that hospital corporation "[t]hrough its subsidiary . . . *owns* and operates the Hospital Interamericano de Medicina Avanzada" in Puerto Rico) (emphasis added).

Reconstruction Finance Corporation"); *id.* at 226 (noting that the Rubber Reserve Company was "owned by the United States through ownership of its stock by the Reconstruction Finance Corporation"); *id.* at 279 (noting that the War Damage Corporation "is owned by the United States").

The majority shareholders in a corporation are also commonly said to "own" the shares in subsidiaries held by that corporation and its other subsidiaries. Here again, such statements can be found in the press,[9] in briefs filed with this Court,[10] and in lower court opinions.[11] Moreover, this Court has described a shareholder in a corporation as owning the shares held by a subsidiary of that corporation. In *Bangor Punta Operations, Inc. v. Bangor & Aroostoock R.R. Co.*, 417 U.S. 703 (1974), two companies, Bangor Punta Corporation and its subsidiary Bangor Punta Operations, Inc. (BPO), were sued by a railroad (BAR). As this Court's opinion detailed,

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[9] *See, e.g., Flexi-Van Completes Tender for Purchase of Castle & Cooke, Inc.*, Wall St. J., July 17, 2000, *available at* 2002 WL-WSJ 3036717 ("Flexi-Van, through a subsidiary, now owns 15.2 million shares, or 89%."); Sarah Schaffer, *NiSource Turns up Heat on Columbia; Shareholders to See $5.7 Billion Bid*, The Washington Post, June 25, 1999, § E, at 1 ("NiSource, through a subsidiary, owns Columbia stock."); *Bestobell Buying Minority*, Fin. Times (London), July 26, 1985, § F2, at 21 ("Bestobell, through its wholly-owned subsidiary, Bestobell Overseas, presently owns 4.49 m[illion] shares in BAL."); Thomas C. Hayes, *Tactic by Belzbergs Backfires*, N.Y. Times, Mar. 2, 1984, § D, at 1 ("Far West paid an average of about $44.30 a share for the 490,895 Gulf shares it owns through a subsidiary.").

[10] *See, e.g.*, Brief for Respondents in Opposition to Cert. at 1n.1, *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991) (No. 89-1448) ("FABI owned [First American Bank of Virginia] stock through a wholly-owned subsidiary, Virginia Bankshares, Inc.").

[11] *See, e.g., Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 120 (4th Cir. 1991) (noting that appellee "stipulated that, through its subsidiaries, it owned 100% of [a company's] common stock"); *Am. Ins. Ass'n v. Clarke*, 865 F.2d 278, 285 (D.C. Cir. 1988) (noting that regulations apply to "holding company's indirect ownership of shares in nonbanking company owned directly by banking subsidiary").

the railroad was a former subsidiary of BPO. *See id.* at 705-06 ("Bangor Punta, through its subsidiary BPO, acquired 98.3% of the outstanding stock of BAR. This was accomplished by the subsidiary's purchase of all the assets of Bangor & Aroostock Corp. (B&A), a Maine corporation established in 1960 as the holding company of BAR."). Although BPO rather than Bangor Punta held title to the shares in the railroad, the majority opinion nonetheless stated that "Bangor Punta controlled and directed BAR *through its ownership* of about 98.3% of the outstanding stock" of BAR. *Id.* at 706 (Powell, J.) (emphasis added). Similarly, the dissent said that "Bangor Punta . . . *owned* the greater majority of the share[s] of respondent railroad." *Id.* at 722 (Marshall, J., dissenting) (emphasis added). Thus, in *Bangor Punta*, this Court described the majority shareholder (Bangor Punta) in a company (BPO) as having "owned" the shares that company held in its subsidiary (the railroad BAR).

If the FSIA's majority ownership requirement is read in light of this common and natural usage, indirect ownership of a majority of the shares in a corporation satisfies the requirement. In other words, if a foreign government holds 80% of the shares in a corporation that in turn holds 80% of the shares in a subsidiary, then the government effectively owns at least 64% of the subsidiary's shares (=80% of 80%), and the majority ownership requirement is satisfied. The Israeli government indisputably owned a majority of the shares of the Dead Sea Companies in this fashion. Like Bangor Punta, the Israeli government held virtually all of the shares of the ultimate parents (Dead Sea Works and then Israel Chemicals Ltd.) of the companies in question. As a consequence, if Bangor Punta could be said to "own" 98.3% of shares of the railroad held by a subsidiary of BPO because Bangor Punta held the shares of BPO, then the Israeli government must equally have "owned" from 66%-98% of the shares of the Dead Sea Companies because it likewise held the shares of their parent corporations.

2. The Majority Shareholder in a Corporation Also Has an "Ownership Interest" in the Subsidiaries of that Corporation

The Dead Sea Companies also qualify as agencies or instrumentalities of a foreign state because Israel had a "majority . . . ownership interest" in them by virtue of being the majority shareholder in their ultimate parent. 28 U.S.C. § 1603(b)(2).

Legal lexicographers have long recognized the word "interest" as the "most general term that can be employed to denote a right, claim, title, or legal share in something." *Black's Law Dictionary* 812 (6th ed. 1990); *accord* 6 *West's Encyclopedia of American Law* 187 (1998) (describing the word "interest" as a "comprehensive term to describe any right, claim, or privilege that an individual has toward real or personal property"); Max Radin, *Law Dictionary* 169 (Lawrence G. Greene ed., 1955) ("A right or title of any extent"); *Anderson's Dictionary of Law* 562 (1889) ("any right, in the nature of property"). Accordingly, as this Court has recognized, the word "interest" can be used to describe the rights of a shareholder in a corporation to the property of that corporation. *See Kaufman v. Societe Internationale Pour Participations Industrielles et Commerciales*, 343 U.S. 156, 160 (1952) ("The innocent stockholder may not have title to corporate assets, but he does [have] an *interest*" in those assets.) (emphasis added); *S.F. Nat'l Bank v. Dodge*, 197 U.S. 70, 94 (1905) (describing the "share of each stockholder" as "an *interest* in the very property held by the corporation") (emphasis added); *see also Paulsen v. Comm'r*, 469 U.S. 131, 138 (1985) (noting that the shareholders in a savings and loan association have a "part *ownership interest* in the bricks and mortar, the goodwill, and all the other assets" of the association) (emphasis added); *id.* at 147 (O'Connor, J., dissenting) (noting that the stockholders in a savings and loan association "had a proportionate proprietary *interest* in the corporation's assets and net earnings") (emphasis added).

Indeed, it is hornbook law that "[s]hares of stock . . . represent a beneficial *interest* in the corporate property." 11 *Fletcher's Cyclopedia of the Law of Private Corporations* § 5100, at 93 (emphasis added). Thus, the phrase "ownership interest" is more than broad enough to describe the rights of a corporate shareholder in the subsidiaries of the corporation.[12]

Nor does it make any difference that the phrase "ownership interest" appears in the FSIA in a passage referring to "a majority of [] shares or other ownership interest." 28 U.S.C. § 1603(b)(2). Under the so-called *ejusdem generis* rule, when general words follow more specific ones, the general words are normally interpreted to "'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (quoting 2A Norman J. Singer, *Statutes & Statutory Construction* § 47:17, at 273-74 (6th ed. 2000)). Here, because ownership of a majority of shares in a corporation is a traditional measure of control over a corporation, *see, e.g.*, Phillip I. Blumberg, *Control and the Partly Owned Corporation: A Preliminary Inquiry into Shared Control*, 10 Fla. J. Int'l L. 419, 422 (1996), the reference to "other ownership interest" in the majority ownership requirement is naturally interpreted to refer to the class of ownership interests that confers a similar measure of control. Thus, purely financial interests such as bonds,

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[12] The Federal Communications Commission uses the phrase "ownership interest" in this manner in its regulations. In applying restrictions upon the concentration of ownership and eligibility for set-aside programs, *see, e.g.*, Peter W. Huber *et al.*, *Federal Communications Law* § 7.4.1, at 610 (2d ed. 1999) (discussing concentration-of-ownership rules); *id.* § 10.4.3.2, at 920 (set-aside programs for PC auctions), the FCC examines the "*[o]wnership interests* that are held indirectly by any party through one or more intervening corporations." 47 C.F.R. § 20.6(d)(8) (emphasis added); *accord, e.g., id.* §§ 1.2110(c)(2)(ii)(G), 22.942(d)(7), 63.09(f), 101.538(b)(2)(vii). Thus, under FCC rules, "if A owns 20% of B, and B owns 40% of licensee C, then A's interest in licensee C would be 8%." *Id.* § 20.6(d)(8).

preferred stocks, and liens would not qualify as an "other ownership interest" under the FSIA. But indirect ownership of a majority of common or other voting stock would because ownership of such stock confers effective control over a majority of a corporation's board of directors.

The Israeli government plainly had such an ownership interest. Uncontroverted evidence in the record shows that the Israeli government appointed representatives to the companies' respective boards. J.A. 75-76. In fact, it is because of Israel's ability to select a majority of these boards that the Dead Sea Companies qualified as "government subsidiary companies" under Israeli law. J.A. 177. Accordingly, as the decision below acknowledged, the Israeli government had the same authority over the Dead Sea Companies that "a majority shareholder would enjoy under American corporate law." Pet. App. 22a; *see also* Dead Sea Br. § I(A)(3) (arguing that Israel in fact had more authority). Thus, Israel's "ownership interest" in the Dead Sea Companies was more than sufficient to satisfy the majority ownership requirement and make it an agency or instrumentality of a foreign state under the FSIA.

B. The Natural Reading of the Majority Ownership Requirement Is Supported by the FSIA's Goal of Protecting Foreign Relations

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotation omitted). Here, the purposes of the FSIA support the conclusion that a company indirectly owned by a foreign government can qualify as an agency or instrumentality of that government under the Act.

In transmitting the bill that eventually became the FSIA, the Departments of State and Justice informed Congress that one of the "broad purposes" of the proposed legislation was "to

minimize irritations in foreign relations arising out of such litigation." Ingersoll Letter, *reprinted in* H.R. Rep. No. 94-1487, at 45. This goal is embodied in the FSIA's jurisdictional provisions and procedures. As this Court has recognized, in the FSIA, "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts." *Verlinden*, 461 U.S. at 497. For example, the Act gives federal courts original jurisdiction "without regard to amount in controversy of any nonjury civil action" against foreign states. 28 U.S.C. § 1330(a). In addition, when foreign governments and their affiliated entities are sued in state courts, they have the right to remove to federal court "at any time for cause shown." *Id.* § 1441(d). Indeed, the Act even provides that, "[u]pon removal, the action shall be tried by the court without jury." *Id.* These broad jurisdictional provisions "encourage the bringing of actions against foreign states in federal courts" and thereby avoid any "disparate treatment of cases involving foreign governments," which "may have adverse foreign relations consequences." *FSIA Section-by-Section Analysis* 2-3, 39, *reprinted in* H.R. Rep. No. 94-1487, at 13, 32.

These jurisdictional provisions reflect longstanding concerns about the treatment of foreign litigants in state courts. As this Court recently observed, it was the "penchant of the state courts to disrupt international relations" with unfair treatment of foreign citizens that led the Founders to provide for alienage jurisdiction in Article III of the Constitution. *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure, Ltd.*, 122 S. Ct. 2054, 2058 (2002); *see also id.* at 2059 (noting Alexander Hamilton's view that "[a]n unjust sentence against a foreigner may be an aggression upon his sovereign rendering alienage jurisdiction essential to the security of the public tranquility") (quotation marks and brackets omitted). Obviously, the danger of disruption is even greater in suits against foreign governments themselves and entities that those governments own and in which they

therefore presumably have a special interest. *See, e.g.*, *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("Every judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government."); *see also Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 814 (1st Cir. 1981) (noting that, because foreign governments often "conduct vast and critically important economic programs and projects through the device of government corporations," suits against those corporations can "have the same impact as suits against the states themselves"). Accordingly, when foreign governments and their agencies and instrumentalities are subject to suit in the United States, the FSIA affords such parties federal jurisdiction and other procedural protections designed to ensure fairness and thereby minimize the risk of any disruption in foreign relations from such litigation.

The goal of protecting foreign relations is not served by drawing a distinction between direct and indirect ownership by foreign governments. As this Court has recognized, foreign governments often use tiered corporate structures in which state enterprises are indirectly owned. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983); *see also* Anjali Kumar, *The State Holding Company: Issues and Options* 3 (World Bank Discussion Paper No. 187, 1992) (noting that "[t]he existence of state holding companies, in many variants, is widespread"). In some instances, foreign governments organize their state-owned enterprises in this manner as a "means of control of a number of public enterprises, because the government ministries find it difficult and inefficient to deal with numerous firms directly." Kumar, *The State Holding Company* at 11; *see also* United Nations, *Organization, Management, and Supervision of Public Enterprises in Developing Countries* 73 (1973) (noting that lesser developed countries often "prefer a large organization to many

independent organizations in the public sector" because they can "deal with and control the former more easily than the latter"). In other instances, foreign governments use tiered structures for the same reasons that private enterprises do: to ensure accountability and effective management, facilitate borrowing or investment, gain tax advantages, limit risk, *etc.* *See* Kumar, *The State Holding Company* at 8. *See generally* 2 Arthur Stone Dewing, *The Financial Policy of Corporations* 980-85 (5th ed. 1953). Finally, as the brief *amicus curiae* of the Irish government demonstrates, a holding company structure may be used to meet an emergency requiring swift and discrete action. *See* Brief *Amicus Curiae* the Republic of Ireland *et al.* at 7-10. None of these rationales suggests that a foreign government's concern over the treatment of the companies owned by it diminishes simply because its ownership is indirect.

Moreover, distinguishing between direct and indirect ownership can lead to arbitrary results. Under such a distinction, a corporation in which a foreign government owns 51% of the stock and thereby controls a bare majority of the corporation's board of directors would qualify as an agency or instrumentality of a foreign state. By contrast, if the same government holds 100% of the stock in a holding company, which in turn holds 100% of the stock of an operating subsidiary, and therefore controls the subsidiary completely, the operating subsidiary would not qualify as an agency or instrumentality. Obviously, however, a foreign government has a greater interest in, and control over, a company that it wholly owns indirectly than a company it barely owns directly. Indeed, a foreign government may have little interest in suits against a holding company that has few tangible assets or operations, yet be gravely concerned about suits against the holding company's subsidiaries that operate the enterprise and possess most of its concrete assets. Thus, reading a distinction between direct and indirect ownership into the majority ownership requirement may strip the companies in which

foreign governments have the most concern of the protections designed to assuage those concerns.

Even worse, the act of drawing of arbitrary distinctions between foreign government-owned enterprises may itself become an irritant in foreign affairs. The United States has no legitimate interest in whether foreign governments use tiered corporate structures for their enterprises. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 (1984) (noting that "a business enterprise should be free to structure itself"). Moreover, where this country's foreign affairs concerns are implicated, the federal government frequently ignores distinctions between direct and indirect ownership in dealing with foreign corporations. *See, e.g., Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480, 485-90 (1947) (applying the Trading with the Enemy Act); *see also* Blumberg, *Control and the Partly Owned Corporation*, 10 Florida J. Int'l L. at 435-41 (discussing foreign investment and foreign trade programs). As a consequence, foreign governments could very well see a refusal to afford their state-owned enterprises the protections of the FSIA based upon indirect ownership as an arbitrary intrusion upon their sovereign authority to organize their enterprises as they choose. *See* Gabe Shawn Varges, *Defining a Sovereign for Immunity Purposes: Proposals to Amend the International Law Association Draft Convention*, 26 Harv. Int'l L.J. 103, 116-17 (1985) (noting that "denial of sovereign status to a sensitive defendant can produce interstate conflict," especially if that denial is based upon an "unfair formula for determining sovereign status"); *see also* Kane, *Suing Foreign Sovereigns*, 34 Stan. L. Rev. at 418 ("The imposition of technical restrictions on the ability of a foreign state to claim sovereign immunity could create needless international friction."). The FSIA should not be interpreted in such a self-defeating manner.

Recognizing that indirect ownership can satisfy the majority ownership requirement does not confer widespread

immunity upon companies indirectly owned by foreign governments. Because government-owned corporations usually operate as "economic enterprise[s]," *First Nat'l City Bank*, 462 U.S. at 624 & n.14, and the FSIA does not afford immunity in cases arising out of commercial activities, *see* 28 U.S.C. § 1605(a)(2), such entities "rarely escape the jurisdiction of the United States courts under the FSIA." Rebecca J. Simmons, Note, *Nationalized and Denationalized Commercial Enterprises under the Foreign Sovereign Immunities Act*, 90 Colum. L. Rev. 2278, 2288 (1990). In addition, the United States has concluded treaties with Israel and some other foreign governments that waive any immunity possessed by the agencies or instrumentalities of those governments that are engaged in business activities in this country. *See Treaty of Friendship, Commerce and Navigation*, Aug. 23, 1951, U.S.-Israel, art. XVIII(3), 5 U.S.T. 550, 570. *See generally* Vernon Setser, *The Immunity Waiver for State-Controlled Business Enterprises in the United States Commercial Treaties*, 1961 Proc. Am. Soc'y Int. L. 89. Thus, the primary effect of reading the majority ownership requirement to include indirect ownership is not to cloak companies indirectly owned by foreign governments with sovereign immunity, but rather to provide such companies with the procedural protections Congress thought necessary to protect this country's foreign relations.

C. The Legislative History of the FSIA Also Supports the Natural Reading of the Majority Ownership Requirement

The legislative history of the FSIA confirms that indirect ownership can satisfy the majority ownership requirement. Despite the widespread use of tiered structures by foreign governments, nothing in the legislative history of the Act suggests that Congress intended to exclude tiered entities from the scope of the FSIA's definition of agency or instrumentality. To the contrary, the history shows that Congress intended the FSIA's definition of agency or

instrumentality to extend to "a variety of forms." *FSIA Section-by-Section Analysis* at 7, *reprinted in* H.R. Rep. No. 94-1487, at 15. Indeed, to underscore the breadth of the definition, Congress listed an assortment of organizations that can qualify as an agency or instrumentality under the FSIA: "a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, [or] an export association." *Id.* at 7-8, *reprinted in* H.R. Rep. No. 94-1487, at 15-16. As the government implicitly recognized in one of the questions adopted by the Court, *see* Gov't Br. I (describing the Dead Sea Companies as part of a "corporate enterprise"), the Dead Sea Companies can be aptly described as part of one of those organizations: a "mining enterprise." *See, e.g., Black's Law Dictionary* 437 (7th ed. abridged 1999) (defining "enterprise" to mean "[o]ne or more persons or organizations that have related activities, unified operation, or common control, and a common business purpose"). Even more fundamentally, an implied restriction on indirect ownership is incompatible with the legislative history's broad and deferential approach to defining an agency or instrumentality. *See, e.g., In re Air Crash Disaster Near Roselawn, Ind. on October 31, 1994*, 96 F.3d 932, 940 (7th Cir. 1996). Thus, like the language of the Act and its purposes, the legislative history shows that the majority ownership requirement covers indirect ownership.

D. The Natural Reading of the Majority Ownership Requirement Is Consistent with the Historical Treatment of Companies Indirectly Owned by the Federal Government

This interpretation is also consistent with the historical treatment of companies indirectly owned by the federal government. Corporations owned by the United States have been described as agencies or instrumentalities of the federal government both by the Court, *see, e.g., Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 394-99 (1995) (describing Amtrak as "an agency or instrumentality of the United

States"),[13] and by Congress, *see id.* at 397 (discussing 12 U.S.C. § 635).[14] Even more pertinently, subsidiaries of corporations directly owned by the federal government have been described in the same manner. For example, the Court described a regional agricultural credit corporation created by the Reconstruction Finance Corporation as one of the federal government's "agents or instrumentalities" in analyzing whether that corporation was immune from suit. *Kiefer & Kiefer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 387-89 (1939). In addition, the charters of many other subsidiaries of the Reconstruction Finance Corporation state that those subsidiaries are "instrumentalit[ies] of the United States." *Reference Manual on Government Corporations* at 333 (Defense Plant Corporation); *see also id.* at 339 (noting that the Defense Supplies Corporation "shall be an *instrumentality*

[13] *See also Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536, 539 (1946) (treating the Reconstruction Finance Corporation as a government agency for purposes of jurisdiction over government set-off); *Clallam Cty. v. United States*, 263 U.S. 341, 344-45 (1923) (finding that United States Spruce Production Corporation was "an instrumentality" of the United States immune from state taxation).

[14] *See also* 7 U.S.C. § 941 (creating a corporate body known as the Rural Telephone Bank and noting that it is "an instrumentality of the United States"); 7 U.S.C. § 1503 (creating the Federal Crop Insurance Corporation as "an agency of and within the Department" of Agriculture); 12 U.S.C. § 831r (noting that "[t]he [Tennessee Valley Authority] Corporation, as an instrumentality and agency of the Government of the United States," has access to the Patent and Trademark Office for various purposes); *id.* § 1283 (establishing the Federal Financing Bank as both a corporate body and "an instrumentality of the United States Government"); *id.* § 1441a (indicating that the Resolution Trust Corporation "shall be an instrumentality [and agency] of the United States"); *id.* § 1452 (noting that the Federal Home Loan Mortgage Corporation is an agency of the United States); *id.* § 1819 (creating the Federal Deposit Insurance Corporation as "an agency of the United States"); 15 U.S.C. § 714 (noting that the Commodity Credit Corporation is "an agency and instrumentality of the United States"); 22 U.S.C. § 290f (creating, "as an agency of the United States of America[,] a body corporate to be known as the Inter-American Foundation"); *id.* § 2191 (noting that the Overseas Private Investment Corporation "shall be an agency of the United States").

of the United States . . . possessed of the privileges and immunities that are conferred upon the Reconstruction Finance Corporation under the Reconstruction Finance Corporation Act, as amended") (emphasis added); *id.* at 442 (same with respect to the Petroleum Reserve Corporation); *id.* at 485 (same with respect to Rubber Reserve Company); *see also id.* at 32, 38, 182, 213, 225, 279 (noting that these corporations were subsidiaries of the RFC). It is therefore perfectly natural to think that Congress regards companies indirectly owned by foreign governments in the same manner.

Moreover, the structure of the Act compels this conclusion. In keeping with "the theme of equality of treatment, which has been present for some time in consideration of the foreign sovereign immunity problem," Robert B. Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Transnat'l L. 33, 45 (1978), many portions of the FSIA are "designed to place foreign governments in parity with our own federal government." Kane, *Suing Foreign Sovereigns,* 34 Stan. L. Rev. at 413. The Act provides foreign governments with a federal forum, bench trials, protections against punitive damages, and other procedural protections afforded the federal government when it is subject to suit. *See supra* p. 5. Moreover, the legislative history makes it clear that these parallels were intentional. *See FSIA Section-by-Section Analysis* at 3 ("As in suits against the U.S. Government, jury trials are excluded."), *reprinted in* H.R. Rep. No. 94-1487, at 13; *accord id.* at 17, 18, 25, *reprinted in* H.R. Rep. No. 94-1487 at 21, 23, 25-26. Thus, absent compelling evidence to the contrary, the FSIA should be interpreted to give companies indirectly owned by foreign governments the same agency-or-instrumentality status that companies indirectly owned by the federal government enjoy. Because the language of the majority ownership requirement, the purposes of the Act, and its legislative history all support this interpretation, it should be adopted.

II. THE ARGUMENTS AGAINST TREATING COMPANIES INDIRECTLY OWNED BY FOREIGN GOVERNMENTS AS AGENCIES OR INSTRUMENTALITIES UNDER THE FSIA ARE UNPERSUASIVE

The lower court, the Solicitor General, and the respondents have advanced a number of arguments for excluding companies indirectly owned by foreign governments from the scope of the FSIA. Notably absent from these arguments is any substantial analysis of the language of the majority ownership requirement, the purposes of the FSIA, its history, or its structure. Instead, the lower court, the Solicitor General, and the respondents rely on an assortment of canons of construction, background legal principles, and policies invoked without reference to the purposes of the Act. These arguments are without merit.

1. The decision below offered little analysis of the language of the majority ownership requirement. It did not, for example, explain how a distinction between direct and indirect ownership can be drawn out of the requirement that "a majority of [] shares or other ownership interests is owned by a foreign state." 28 U.S.C. § 1603(b)(2). Indeed, in its discussion of the majority ownership requirement (Pet. App. 19a-21a), the lower court did not even consider whether a foreign government that holds the shares in a company can be said to "own" the shares of that company's subsidiaries.

The lower court did assert (Pet. App. 20a) that indirect ownership of shares cannot be an "other ownership interest" based upon the canon that each word in a statute should be given effect. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 173-74 (2001). Noting that the majority ownership requirement refers to "a majority of shares" as well as "other ownership interest," 28 U.S.C. § 1603(b)(2), the lower court contended that such an interpretation would "make the majority-shareholder requirement superfluous." That is not true. As

noted above, *see supra* pp. 22-23, when general words follow more specific ones, they are not interpreted to exclude the items covered by the specific ones; instead, under the *ejusdem generis* rule, the general words are "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City*, 532 U.S. at 114-15 (quotation omitted). Because such an interpretation gives effect to the particular words in such a sequence by "treating the particular words as indicating the class" covered by the general words, 2A Singer, *Statutes & Statutory Construction* § 47:17, at 285 (quotation omitted), the lower court's sole textual argument on the indirect ownership issue is without merit.

2. No doubt recognizing the weakness in the lower court's analysis, the Solicitor General advances several alternative arguments. These arguments are also unpersuasive.

a. The Solicitor General asserts (Gov't Br. 6-7) that the issue before this Court is whether the requirement should be interpreted to incorporate the apparently technical conceptions of either "actual legal ownership" or "constructive ownership." This is a false dichotomy. As noted above, *see supra* p. 15, statutes are normally interpreted according to their "ordinary, contemporary, common meaning" absent evidence of a contrary congressional intent. *Williams*, 529 U.S. at 2000 (quotation omitted). Moreover, as this Court recognized in a case cited by the Government (Gov't Br. 9 n.3), ownership is generally an "untechnical" concept. *Flink*, 279 U.S. at 63; *see also* John E. Cribbet & Corwin W. Johnson, *Principles of the Law of Property* 16 (1989) (noting that "American law has not made much use of the term ownership in [the] technical sense"). Accordingly, the concept of ownership can, and should, be interpreted according to its natural meaning rather than the technical alternatives proffered by the Government.

The Government's treatment of the "other ownership interest" prong of the majority ownership requirement is even less persuasive. In fact, the Solicitor General does not even address this prong. Instead, the Government's brief persistently asserts that the FSIA "provides that the term 'agency or instrumentality' of a foreign state includes a corporation 'a majority of *whose* shares . . . is *owned by a foreign state,*'" Gov't Br. 9 (quoting 28 U.S.C. § 1603(b)(2)) (emphasis and ellipsis deleting the phrase "or other ownership interest" in original); *accord id.* at 6, 11 — thereby once again "regrettably submerg[ing] in ellipsis" key statutory language. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 217 (1988) (Scalia, J., concurring).

b. The Solicitor General also argues (Gov't Br. 7-10) that, in light of the "bedrock" principle that a corporation is separate from its stockholders, the majority ownership requirement should be limited to direct ownership. This argument is plainly without merit because the FSIA explicitly rejects the principle of corporate separation in the definition of an agency or instrumentality. Prior to the FSIA, many lower courts did not permit corporations owned in any manner by foreign governments to claim sovereign immunity on the theory that the corporations were legally separate from those governments. *See, e.g.*, Eric Schopler, *Modern Status of the Rules as to Immunity of Foreign Sovereign from Suit in Federal or State Courts*, 25 A.L.R. 322 § 6[b] (1969). The FSIA rejects this "separate entity rule." Far from limiting the term agency or instrumentality to entities that are legally part of a foreign government, the Act defines an agency or instrumentality to be, among other things, "a separate legal person, corporate or otherwise." 28 U.S.C. § 1603(b)(1). In light of this square rejection of the corporate separateness principle in dealing with corporations in general, there is no reason to think that the definition of agency or instrumentality implicitly reincorporates it in dealing with tiered corporations.

In addition, the "related concept of limited corporate liability" invoked by the Solicitor General (Gov't Br. 7-8) is inapplicable here because — as this Court observed in yet another case cited by the Government (*id.* at 8) — the FSIA was "not intended to affect the substantive law determining the liability of a foreign state or instrumentality." *First Nat'l City Bank*, 462 U.S. at 620-21. Finally, the corporate form can be ignored "where it is interposed to defeat legislative policies." *Id.* at 630; *accord Copperweld*, 467 U.S. at 772-73; *Bangor Punta*, 417 U.S. at 713; *Anderson v. Abbott*, 321 U.S. 349, 363 (1944); *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 403-04 (1960). Because the distinction between direct and indirect ownership undermines the FSIA's goal of minimizing disruptions in foreign affairs, and in fact creates new opportunities for diplomatic friction, *see supra* pp. 26-27, the policies of the Act foreclose any application of the corporate separateness principle here.

c. The Solicitor General asserts (Gov't Br. 11) that this Court should refuse to treat entities indirectly owned by foreign governments as agencies or instrumentalities of those governments because doing so would "grant foreign states more generous immunity-based protections than foreign states extend to the United States or other foreign states." As demonstrated above, however, recognizing a company as an agency or instrumentality does not render it immune from suit under the FSIA. *See supra* pp. 27-28. In addition, while most foreign immunity laws outside the United States do not treat government-owned corporations as "foreign states," they afford foreign government-owned companies essentially the same immunity that is available under the FSIA because, in keeping with the restrictive theory of foreign sovereign immunity codified in the FSIA, they give immunity to entities performing sovereign acts. *See* Charles N. Brower *et al.*, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 Am.

J. Int'l L. 200, 210 (1979).[15] It makes no difference that companies indirectly owned by foreign governments enjoy the protections of the FSIA when subject to suit here. Nothing in either the Act or its history even remotely suggests that these protections were afforded to foreign governments and their affiliated entities out of reciprocity. To the contrary, as demonstrated above, *see supra* pp. 23-25, these protections serve America's international interests by minimizing the disruptions in foreign relations resulting from the litigation permitted by the FSIA.

d. Finally, the Solicitor General asserts (Gov't Br. 9 n.4) that, "[w]hen Congress intends legislation to embrace both a parent corporation and its subsidiaries, it typically uses more explicit language." The statutes cited by the Solicitor General, however, embrace more than just subsidiaries and their parent corporations. They extend to any entity that owns *or controls* a company,[16] a category that is different and

[15] For example, England's immunity statute provides that references in the statute to a "State" do not include "any entity . . . which is distinct from the executive organs of the government and capable of suing or being sued," State Immunity Act, 1978, c.33, § 14(1)(c) (Eng.), but then goes on to state that such a "separate entity" is immune from jurisdiction if "the proceedings relate to anything done by it in the exercise of sovereign authority" where a State would have been immune under the same circumstances. *Id.* § 14(2); *see also* European Convention on State Immunity and Additional Protocol, May 16, 1972, Eur. T.S. No. 74, art. 27, § 1 (providing that the term "'Contracting State' shall not include any legal entity of a Contracting State which is distinct therefrom," but that "courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority (*acta jura imperii*)").

[16] *See* 7 U.S.C. § 1a(8) (defining a "cooperative association of producers" as an entity "owned *or controlled*, directly or indirectly, by producers of agricultural products") (emphasis added); 12 U.S.C. § 221a(b)(4) (defining "affiliate" to mean any entity "[w]hich owns *or controls*, directly or indirectly," a majority of shares in a bank) (emphasis added); *id.* § 1813(w)(4)(A) (defining "subsidiary" to mean "any company which is owned *or controlled* directly or indirectly by another company") (emphasis added); *id.* § 3106(c)(1) (defining "affiliate" to mean "any company more than 5 per centum of whose voting shares is directly or indirectly owned

"more expansive" than ownership of a majority of shares or other ownership interest. Blumberg, *Control and the Partially Owned Corporation*; 10 Fla. J. Int'l L. at 422-23. As a consequence, the absence of any reference to control in the FSIA does not suggest that references to ownership are normally understood to be limited to direct ownership. It simply indicates that Congress did not want the FSIA's majority ownership requirement to cover the broader category of control. *See id.* (noting that the concept of control is often used in statutes to refer to lesser forms of control over corporate decision making than majority ownership).

3. Respondents' attempts to defend the decision below are equally unpersuasive.

a. Respondents asserted in their opposition to the petition (Pet. Opp. 16-17) that the *ejusdem generis* rule supports the decision below because it indicates that the phrase "other ownership interest" refers "not . . . to forms of indirect, inchoate means of corporate control, but to forms of securities like stock, such as convertible bonds, partnership interests, fractional interests in leases or assets, and the like." Respondents do not, however, explain what possible relevance a fractional interest in a lease has to the FSIA or how the majority interest in convertible bonds would be calculated.

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or controlled or held with power to vote by the specified foreign bank or company") (emphasis added); 15 U.S.C. § 1802(3) (defining "newspaper owner" to mean "any person who owns *or controls* directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications") (emphasis added); 22 U.S.C. § 5605(b)(2)(F)(i)(II) (permitting suspension of "any foreign air carrier owned *or controlled*, directly or indirectly, by" certain governments) (emphasis added); 26 U.S.C. § 482 (referring to organizations "owned or *controlled* directly or indirectly by the same interests") (emphasis added); 30 U.S.C. § 184(a) (referring to "any subsidiary, affiliate, or persons *controlled* by or under common control with" certain persons) (emphasis added); 47 U.S.C. § 702(7) (defining the term "communications common carrier" to mean any "entity which owns *or controls*, directly or indirectly, *or is under direct or indirect control with*, any" common carrier) (emphasis added).

Because the *ejusdem generis* rule is applied in light of the "subject and purpose of the statute," 2A Singer, *Statutes & Statutory Construction* § 47:18, at 289, this argument is without merit.

b. Respondents also assert (Pet. Opp. 16) that interpreting the majority ownership requirement to permit indirect ownership would result in "infinite 'tiering'." Respondents do not, however, explain what is objectionable about such tiering, which FCC regulations, for example, explicitly contemplate. *See, e.g.*, 47 C.F.R. § 1.2110(c)(2)(ii)(G) (noting that "if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest").[17] Even more importantly, infinite tiering need not be permitted in order to construe the majority ownership requirement to encompass indirect ownership. The majority ownership requirement can instead be read to focus upon effective or beneficial ownership, thereby "giving effect to the substance of a foreign government's interest rather than to the form of the ownership." *Musopole v. South African Airways (Pty.) Ltd.*, 172 F. Supp. 2d 443, 447 (S.D.N.Y. 2001). Under this approach, "if Nation A owned 51 percent of Company B and Company B owned 51 percent of Company C, the beneficial interest of Nation A in Company C would be approximately 25 percent," *id.*, and Company C therefore would not qualify as an agency or instrumentality because the

[17] In addition, the "infinite tiering" interpretation has a strong textual basis. *See In re Air Crash Disaster*, 96 F.3d at 940-41. According to the FSIA, the term foreign state "includes . . . an agency or instrumentality of a foreign state." 28 U.S.C. § 1603 (a). Since that definition applies "[f]or purposes of this chapter . . . except as used in section 1608," *id.* § 1603, and the majority ownership requirement appears in that same chapter and in section 1603(b)(2) rather than section 1608, the definition of foreign state is by its terms applicable to the majority ownership requirement. As a consequence, the text of the FSIA's definitions indicate that any entity that qualifies as an agency or instrumentality is a foreign state for purposes of applying the majority ownership requirement.

foreign government's effective ownership interest is less than 50 percent. Thus, the natural reading of the majority ownership requirement simply treats corporations in which foreign governments have an effective majority interest as agencies or instrumentalities of those governments.

c. Respondents contend (Pet. Opp. 17) that reading a distinction between direct and indirect ownership into the FSIA would create a "simpler and more judicially administrable test." They do not, however, even begin to show why a simpler test is needed. While the corporate history of the Dead Sea Companies is somewhat complex, it was not at all difficult for the lower courts to determine whether a majority of the Companies were owned by the State of Israel, and this factual issue has never been a source of dispute between the parties. Moreover, respondents have not cited any case in which there was a litigated dispute over the ownership structure of a foreign government-owned company.

d. Finally, essentially conceding the difficulty of their interpretation, respondents argue (Pet. Opp. 17) that the majority ownership requirement should be construed narrowly under the presumption that "federal jurisdictional statutes should be construed narrowly." The majority ownership requirement is not, however, a jurisdictional provision: it is a definition that is grouped with the non-jurisdictional provisions of the FSIA in chapter 97 of Title 28. *See* 28 U.S.C. § 1603. Even more importantly, because the expansive jurisdictional provisions in the FSIA were intended to encourage the bringing of suits in federal courts, *see FSIA Section-by-Section Analysis* at 3, *reprinted in* H.R. Rep. No. 94-1487, at 13; *accord supra* pp. 23-24, the rule that jurisdictional provisions should be read narrowly does not apply to the FSIA. *See In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1241 (3d Cir. 1994) (recognizing that a "liberal approach in implementing the FSIA's comprehensive jurisdictional scheme

is most conducive to the FSIA's paramount objectives of keeping the federal courts open to foreign states").

III. THE PRIVATIZATION OF THE DEAD SEA DEFENDANTS DOES NOT STRIP THEM OF THE PROTECTIONS THEY ENJOYED AS AGENCIES OR INSTRUMENTALITIES OF ISRAEL

Respondents and the Solicitor General also contend that the Dead Sea Companies cannot satisfy the majority ownership requirement because they were privatized before respondents filed their claims in this case. As every court of appeals to decide the issue has recognized, *see Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480-81 (5th Cir. 1998); *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1378-79 (8th Cir. 1993); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 449-50 (6th Cir. 1988), this contention is incorrect. A company qualifies as an agency or instrumentality of a foreign government if it satisfies the majority ownership requirement (and other elements of the FSIA's definition of an agency or instrumentality) at the time of the conduct at issue in a case.

A. The Present Tense Can Be, and in the FSIA Is, Used to Refer to Conduct Prior to Suit

According to the Solicitor General (Gov't Br. 15), the "[m]ost telling[]" evidence that Congress intended the definition of agency or instrumentality to be applied exclusively to the time of filing is the fact that the majority ownership requirement "uses the present tense." That fact is not, however, telling at all. As a purely grammatical matter, the present tense can be used to express matters that "do not refer specifically to the present but are general timeless statements." Sidney Greenbaum *et al.*, *A Grammar of Contemporary English* § 3.25, at 85 (1972); *see also Coalition for Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 225 (9th Cir. 1992) ("The present tense is commonly used to refer to

past, present, and future all at the same time."). Moreover, the use of the present tense in statutory provisions is an especially poor guide because legislative drafters try, "[w]henever possible, [to] use the present tense and avoid the future and past tense." *House Legislative Counsel's Manual on Drafting Style*, HLC 104-1, § 351(f)(1) (1995); *accord* Reed Dickerson, *Legislative Drafting* § 6.5(a), at 65 (1977); Lawrence E. Filson, *The Legislative Drafter's Desk Reference* § 21.3, at 231 (1992). Indeed, according to the House of Representative's manual on drafting, "it is preferable to remain in the present tense" even when "expressing time relationships." *House Legislative Counsel's Manual on Drafting Style*, HLC 104-1, § 351(f)(2). Thus, as this Court has observed, "the tense of the verb 'be' is not, considered alone, dispositive" of the question whether a provision applies to present or past status. *Costello v. INS*, 376 U.S. 120, 125 (1964).

Moreover, mechanically reading the FSIA to refer to the time of suit merely because the present tense is used would lead to absurd results. For example, the FSIA provides that a foreign state is generally not immune from suit in cases:

> in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . if such act or provision of material support *is engaged in* by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency . . . .

28 U.S.C. § 1605(a)(7) (emphasis added). If the use of the present tense here were to dictate that the provision be applied as of the time that a suit is filed, a plaintiff would be required to file suit while an official, employee, or agent is engaged in or supporting an act of torture, hostage taking, extrajudicial killing, or the like. Obviously, however, Congress did not

intend to require hostages to file suit while they are being held hostage or the victims of extrajudicial killings to file suit while an agent of a foreign government is engaged in killing them. Accordingly, in applying this provision, courts have looked to the conduct of foreign governments prior to the filing of suit. *See, e.g., Weinstein v. Islamic Republic of Iran*, 184 F. Supp. 2d 13, 21-22 (D.D.C. 2002) (examining conduct of Iranian agents in 1996 in suit filed in 2000).

The FSIA provision dealing with arbitration has been applied similarly. Under that provision, a foreign government is not immune from suit in any case:

> in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration . . . or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration *takes place* or is intended to take place in the United States . . . .

28 U.S.C. § 1605(a)(6). Although the reference to an arbitration taking place is in the present tense, this provision obviously refers to events prior to the filing of suit because an action to confirm an arbitration award can only take place after the arbitration has occurred. The FSIA's arbitration provision has therefore been applied to arbitrations that took place years before suit is brought to confirm the award made in the arbitration. *See, e.g., Employers Ins. of Wausau v. Banco de Seguros del Estado*, 199 F.3d 937, 940-41 (7th Cir. 1999) (finding that an instrumentality of Uruguay was subject to suit to confirm an arbitration award issued in 1995 even though the petition to confirm was not filed until 1998). Thus, contrary to the Government's suggestion, the use of the present tense in the FSIA does not dictate that the Act's provisions be applied at the time of suit.

B. The Context in Which the Majority Ownership Requirement Is Used Shows that It Can Be Applied to Ownership at the Time of the Conduct Underlying Suit

Although the majority ownership requirement is couched in the present tense, it can, and in claims against privatized entities should, be applied to ownership at the time of the conduct underlying a suit. The majority ownership requirement is part of a definition, which refers not to events that occur at a particular time, but to something generic and timeless: namely, what constitutes an agency or instrumentality under the Act. Thus, by its nature, the requirement can be applied to any point in time. Moreover, the context in which this definition is used in the FSIA shows that it can be applied to the time of the conduct at issue in a case.

This Court has applied the sovereign immunity of the federal government based upon status at the time of the underlying conduct. In *The Western Maid v. Thompson*, 257 U.S. 419 (1922), two boats were sued for accidents that occurred during World War I while the boats were either under lease or charter to the United States and performing public functions. *See id.* at 430-31. Because the suits were brought after the boats had ceased to perform these functions and were returned to their private owners, the case raised the question "whether a liability attached to the ships which although dormant while the United States was in possession became enforcible as soon as the vessels came into hands that could be sued." *Id.* at 432. The Court held no such liability attached, based upon the sovereign immunity those ships enjoyed due to the United States' possession of them at the time of the accidents. *See id.* at 433-34; *see also id.* at 433 (refusing to find that transfer of ship activated "a claim that had no existence before"). Thus, in *The Western Maid* application of sovereign immunity turned upon the status of the ships at the time of the underlying conduct.

Like domestic sovereign immunity, other status-based immunities are also applied based upon status at the time of the conduct rather than the time of suit. For example, in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), the Court afforded President Nixon absolute immunity from a suit brought after his resignation because the suit challenged his conduct while in office: "a former President of the United States," this Court observed, "is entitled to absolute immunity from damages liability predicated on his official acts." *Id.* at 749. Other types of official immunity have similarly been applied based upon a defendant's status at the time of the underlying conduct. *See, e.g., Mitchell v. Forsythe*, 472 U.S. 511 (1985) (qualified immunity); *United States v. Johnson*, 383 U.S. 169 (1966) (legislative immunity); *Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995) (prosecutorial immunity); *Grove v. Rizzolo*, 441 F.2d 1153 (3d Cir. 1971) (judicial immunity). Diplomatic immunity similarly protects former diplomats from claims based upon their official conduct while diplomats. *See* Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, art. 39; *see also* 28 U.S.C. § 254d (incorporating the immunity provisions of the Vienna Convention).

The treatment of status-based immunities presents an obvious model for the majority ownership requirement because the requirement determines whether companies owned by foreign governments are agencies or instrumentalities eligible for immunity and related procedural protections under the Act by virtue of their government-owned status. Nor is there any reason to think that Congress intended the FSIA to depart from the traditional treatment of status-based immunities. *See, e.g., United States v. Texas*, 507 U.S. 529, 534 (1993) (noting that federal statutes must be interpreted with a "presumption in favor of long-established and familiar principles") (quotation omitted). As the Court observed in initially recognizing foreign sovereign immunity, diplomatic immunity arises out of the same "class of cases." *The*

Schooner Exchange, 11 U.S. (7 Cranch.) at 137-39 (Marshall, C.J.). *See generally* Charles Lewis, *State and Diplomatic Immunity* 1 (1990) (noting that both "arise from the same consideration"). Even more importantly, as demonstrated above, *see supra* p. 5, 31, the FSIA is structured to provide foreign governments with protections similar to those enjoyed by the federal government. As a consequence, the legal context in which the majority ownership requirement is used indicates that the requirement can be applied to the time of the conduct underlying suit.

C. The FSIA's Goal of Protecting Foreign Relations Supports Application of the Majority Ownership Requirement to the Time of the Conduct Underlying Suit

The FSIA's goal of protecting foreign relations also supports application of the majority ownership requirement to the time of the conduct underlying suit because "the foreign policy considerations underlying sovereign immunity are not necessarily eliminated when the defendant loses its status as a foreign state before the time of filing suit." *Gen. Elec. Capital*, 991 F.2d at 1382; *accord Pere*, 150 F.3d at 481.

To begin with, in some suits against privatized enterprises, foreign governments may be the real parties in interest because of provisions indemnifying the buyers of those enterprises against claims arising out of conduct prior to the sale. *See, e.g., Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (noting that a foreign state "may remain financially responsible for any judgments won against a former state-owned entity, especially where the acts at issue occurred when the entity was still under government control"). In those cases, a rigid interpretation of the majority ownership requirement forbidding its application to privatized entities would subject foreign governments to suit without the protections of the FSIA, thereby undermining the statute's

goal of minimizing the risk of disruption of foreign relations from suits involving foreign governments.

Suits against privatized enterprises may also implicate actions of foreign governments that "remain potentially politically sensitive even after the entity is sold or otherwise loses its status as a foreign state or instrumentality." Working Group of the Am. Bar Ass'n, *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, 530 (2002). Consider, for example, what would happen if a formerly government-owned pharmaceutical company were sued (based upon general personal jurisdiction) for injuries suffered as a result of an emergency vaccine applied in response to an epidemic. In dealing with the epidemic, the foreign government may have been forced to make some difficult trade-offs between cost, safety, and swiftness of response. If the company could not qualify as an agency or instrumentality because of its privatization, those trade-offs would be subject to suit, discovery, and trial before an American jury — a possibility that might well prompt the very sort of protest that the FSIA was designed to avoid. Thus, for this reason as well, applying the majority ownership requirement to the time of the conduct underlying suits against privatized companies serves the FSIA's goal of protecting foreign relations.

D. The Lower Court's Arguments for Applying the Definition of Agency or Instrumentality Only at the Time of Filing Are Unpersuasive

In suggesting that the definition of agency or instrumentality can only be applied based upon the time of filing, the lower court did not rest, as the Solicitor General does, on the mere use of the present tense in the majority ownership requirement. Instead, it looked (Pet. App. 17a-19a) to the structure and the purpose of the FSIA and concluded that it was "unclear that the policies of the FSIA would be served by extending [foreign sovereign] immunity to entities

that are now private." Pet. App. 18a. The court's reasoning was, however, flawed.

According to the lower court, the FSIA "seeks to avoid affronting other governments by making it hard for private litigants to haul them into court" because claims against foreign nations and their actors "raise questions of foreign policy rather than law" and should therefore be redressed "through diplomatic channels, rather than through a civil complaint." Pet. App. 18a. Since "diplomatic channels may be of no avail in resolving a dispute between private parties," and it is not clear that a suit against a privatized agency of a foreign state "will force the state to appear" or "to pay money to a private litigant," the court of appeals reasoned that it was unclear whether the purpose of the FSIA would be served by extending sovereign immunity to privatized companies. *Id.* In addition, while acknowledging that a foreign state might be affected by the litigation of claims against former agencies or instrumentalities, the lower court concluded that "the affront to the foreign sovereign will be remote and indirect if it is not held answerable" in those suits. Pet. App. 18a-19a.

With due respect to the Ninth Circuit, these arguments display a profound misunderstanding of the FSIA. To begin with, as demonstrated above, the Act rarely makes agencies or instrumentalities of a foreign state immune from suit. *See supra* pp. 27-28. In addition, the FSIA does not seek to make it hard to haul foreign countries into court or to relegate claims against them to diplomatic channels; to the contrary, the Act was explicitly designed to "facilitate . . . litigation against foreign states," Ingersoll Letter, *reprinted in* H.R. Rep. No. 94-1487, at 45, and to discontinue the State Department's involvement in determining whether to accord foreign sovereign immunity, *see* H.R. Rep. No. 94-1487, at 8-9, 12. Finally, and most fundamentally, the FSIA does not consider affronts to foreign sovereigns to be unimportant so long as those sovereigns are not held liable for damages. Quite the contrary: recognizing that such affronts may cause diplomatic

friction, the Act seeks to protect against them by providing agencies or instrumentalities of foreign governments with procedural protections such as bench trials in a federal forum without regard to the amount in controversy. *See supra* pp. 23-25. Only by ignoring the FSIA's crucial goal of protecting foreign relations, and ascribing others to it, was the court of appeals able to question whether privatized entities should be treated as agencies or instrumentalities in suits based upon their conduct before privatization.

Noting that the FSIA contains special rules for service of process and for enforcing judgments against foreign states, the lower court also stated that it had "no doubt that, in enacting the FSIA, Congress had in mind suits brought against entities that are currently foreign states." Pet. App. 17a-18a. While it is true that Congress contemplated suits against sitting foreign governments and the entities they continue to own or operate at the time of suit, it hardly follows that Congress intended to strip companies of the FSIA's procedural protections if they have been privatized in the interim between the conduct underlying a suit and a plaintiff's decision to file (which in this case was more than a decade). Certainly, the provisions for service of process and execution do not suggest this. The Act's service provisions relating to agencies or instrumentalities permit the same method of service used on domestic corporations, *compare* 28 U.S.C. § 1608(b)(2) *with* Fed. R. Civ. P. 4(d)(3), and the execution provisions strip agencies or instrumentalities of foreign governments of almost all immunity from execution. *See* 28 U.S.C. § 1610(b); *see generally* von Mehren, *The Foreign Sovereign Immunities Act*, 17 Colum. J. Transnat'l L. at 64-65. Even more importantly, the fact that the FSIA is primarily concerned with suits against sitting governments and their current agencies or instrumentalities hardly suggests that the historical practice with respect to status-based immunity and the purposes of the Act can be ignored in determining whether privatized companies should be stripped of the protections that they

enjoyed under the FSIA at the time of the conduct at issue in a case.

In short, the lower court could only raise a "question" about the treatment of privatized companies by disregarding the true purposes of the FSIA and grasping at seemingly irrelevant points. Even at that — with all of the court's erroneous assumptions — the most it could say was that the issue was a "close one." Pet. App. 19a. But, as recognized by every other court of appeals case to address the issue, it is not close at all. In keeping with the purposes of the Act and the doctrinal context underlying it, the FSIA plainly applies to entities that qualified as agencies or instrumentalities at the time of the conduct at issue in a case.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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August 23, 2002

UNITED STATES CODE
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV–JURISDICTION AND VENUE
CHAPTER 97–JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

* * *

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph--

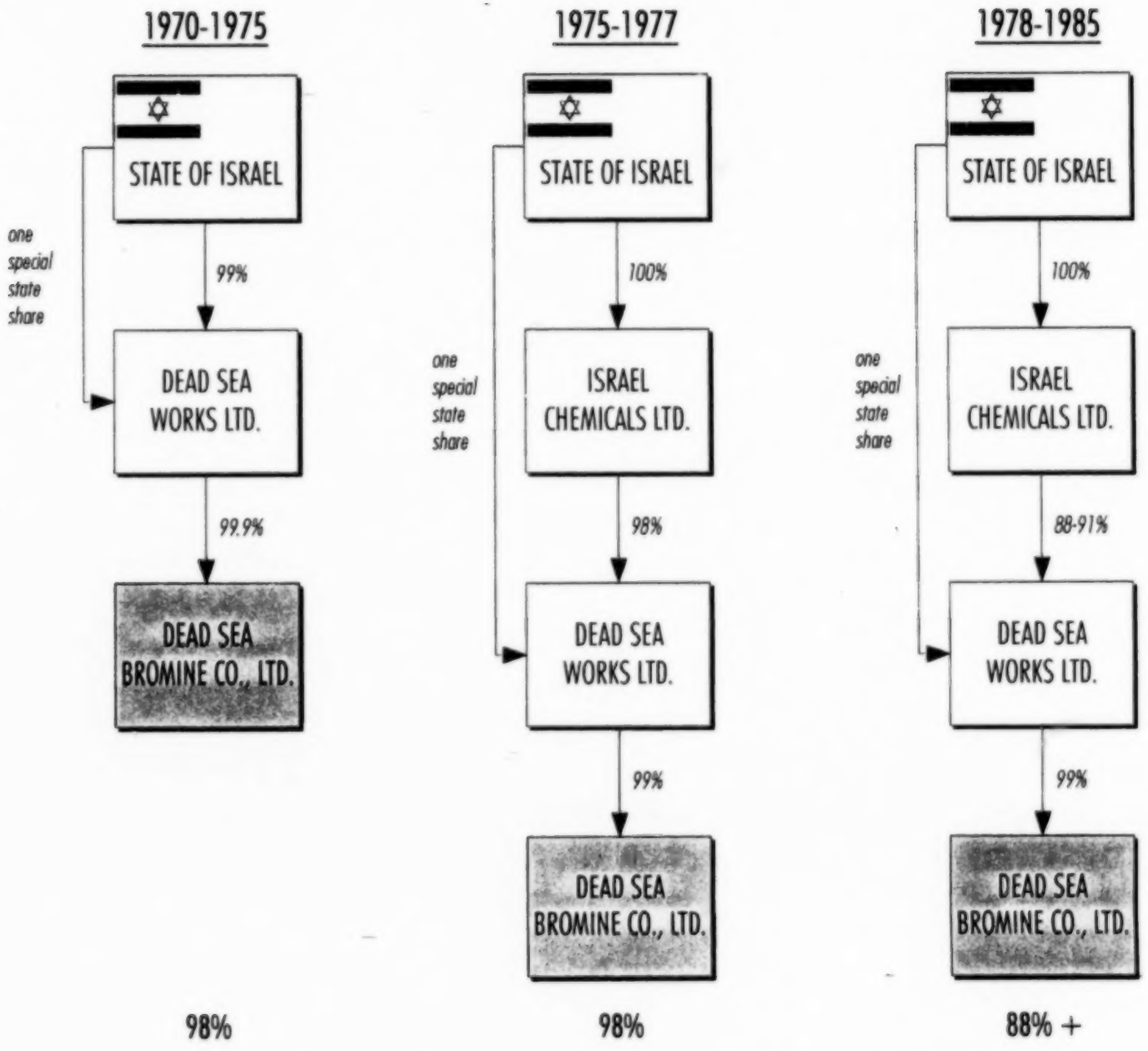
(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if--

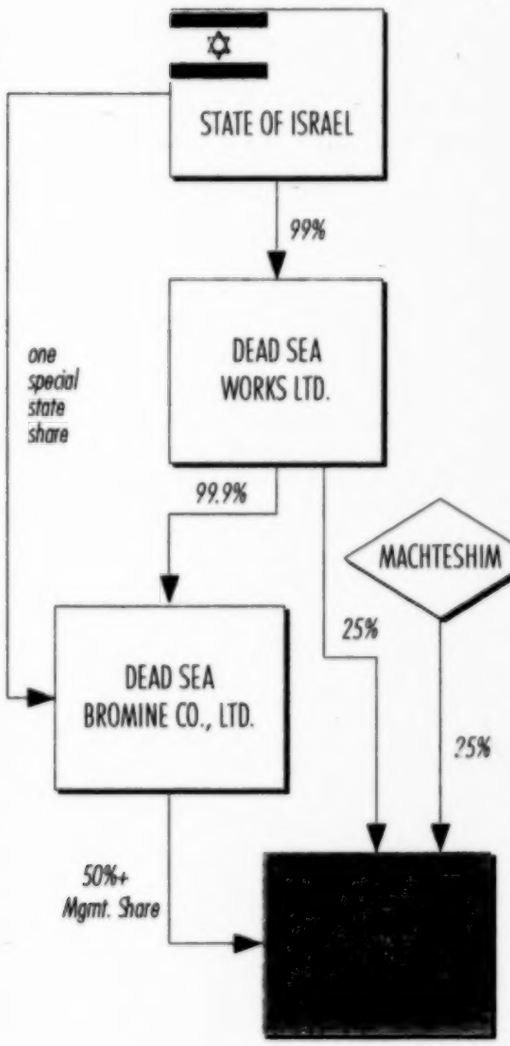
(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not

afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

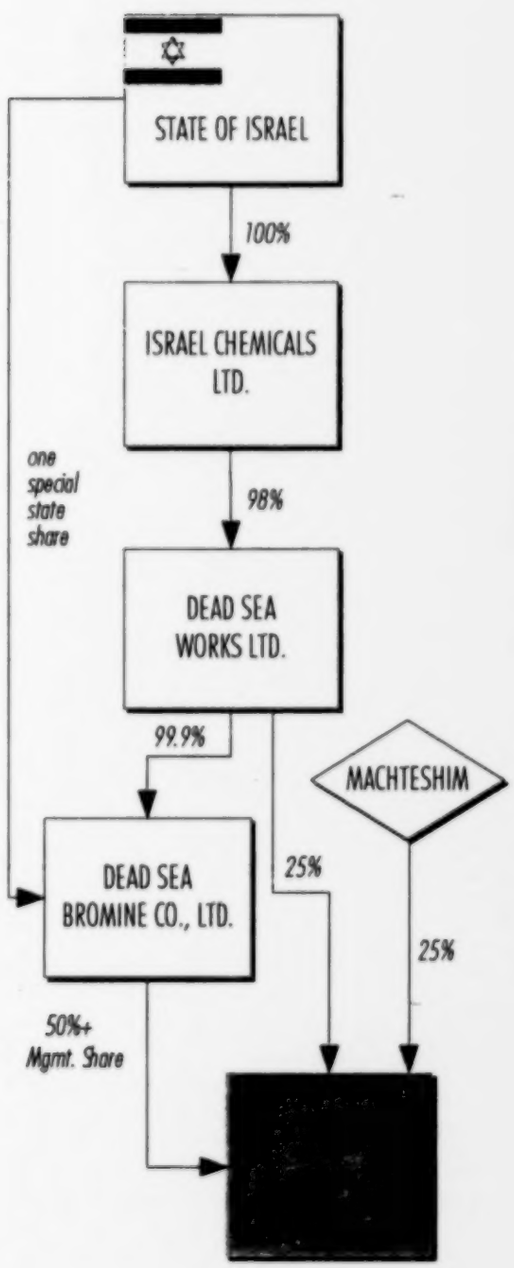

1970-1975
STATE OF ISRAEL
one special state share
99%
DEAD SEA WORKS LTD.
99.9%
DEAD SEA BROMINE CO., LTD.
98%
1975-1977
STATE OF ISRAEL
100%
one special state share
ISRAEL CHEMICALS LTD.
98%
DEAD SEA WORKS LTD.
99%
DEAD SEA BROMINE CO., LTD.
98%
1978-1985
STATE OF ISRAEL
100%
one special state share
ISRAEL CHEMICALS LTD.
88-91%
DEAD SEA WORKS LTD.
99%
DEAD SEA BROMINE CO., LTD.
88% +

1970-1975



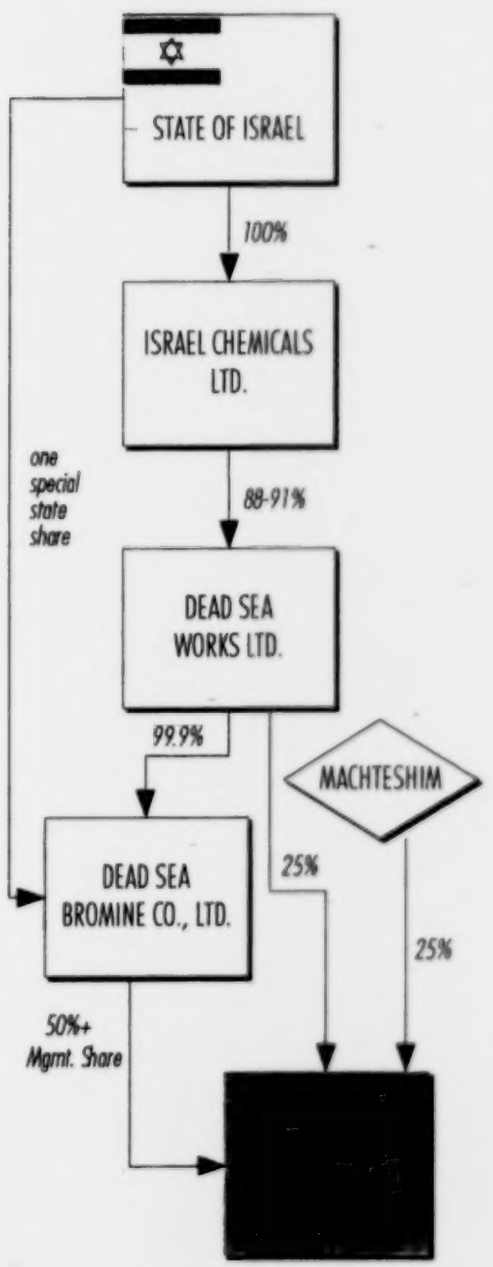
74%+ Mgmt. Share

1975-1977



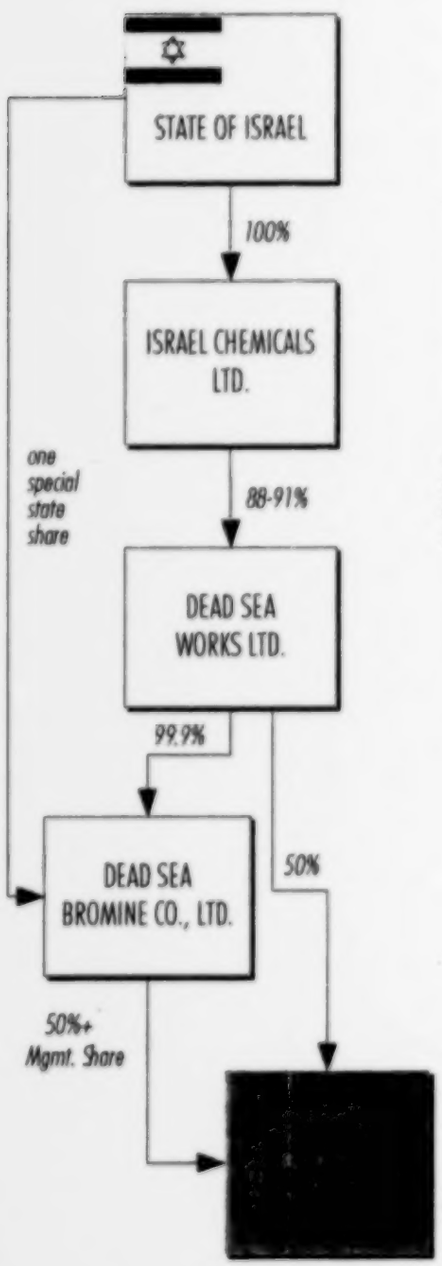
74%+ Mgmt. Share

1978-1981



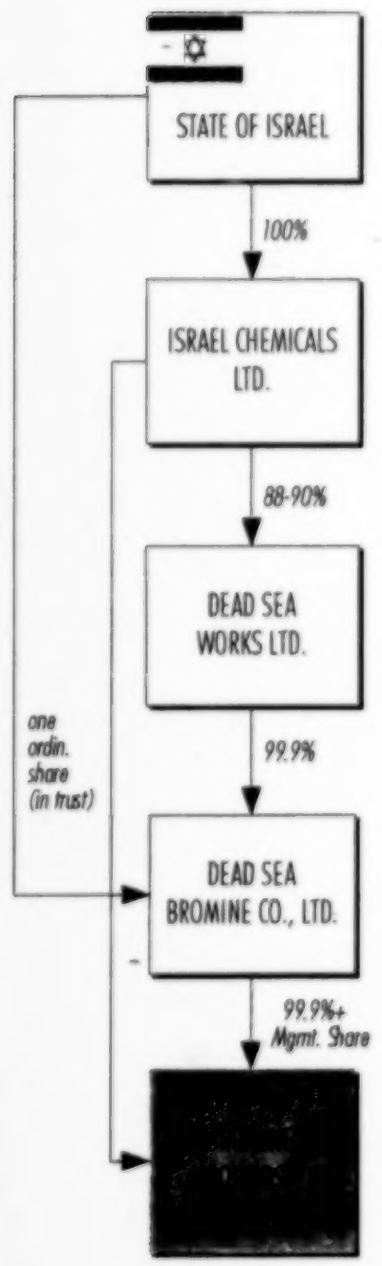
Approx. 66%+ Mgmt. Share

1981-May 1984



Approx. 88%+ Mgmt. Share

May 1984-1985



Approx. 88%+ Mgmt. Share

Supreme Court, U.S.
FILED
AUG 23 2002
CLERK

No. 01-594

IN THE

Supreme Court of the United States

DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act (the "FSIA" or "Act") establishes the ground rules for claims against a foreign state and, also, an "agency or instrumentality of a foreign state." 28 U.S.C. §§ 1330(a), 1603(a). The term "agency or instrumentality of a foreign state" is defined in pertinent part as "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state. . . ." *Id.* § 1603(b)(2).

The Court granted the petition for a writ of certiorari to resolve the following questions:

1. Whether a corporation is an "agency or instrumentality" if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation.

2. Whether a corporation is an "agency or instrumentality" if a foreign state owned a majority of the shares of the corporation at the time of the events giving rise to litigation, but the foreign state does not own a majority of those shares at the time that a plaintiff commences a suit against the corporation.

STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statement was set forth at page *ii* of their Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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OPINIONS BELOW

The Ninth Circuit's opinion is reported at 251 F.3d 795 (9th Cir. 2001) and is reproduced in the appendix to the petition for a writ of certiorari in No. 01-594 ("Pet. App.") at 1a. The district court's orders holding that it had jurisdiction, denying rehearing of that order, dismissing the action for *forum non conveniens*, and denying rehearing of that order are reproduced at Pet. App. 55a, 49a, 34a and 27a, respectively.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on May 30, 2001, and entered its order denying timely petitions for rehearing *en banc* on July 10, 2001. Pet. App. 120a. The petitions for a writ of certiorari in No. 01-593 and No. 01-594 were filed on October 9, 2001. In an order dated June 28, 2002, the petitions were granted and the cases consolidated. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act ("FSIA" or "Act") is codified at sections 1330, 1332(a)(4), 1391(f), 1441(d), 1602-11 of title 28, United States Code. It provides, among other things, that "[a]ny civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed" to federal court. 28 U.S.C. § 1441(d). Section 1603(a) of title 28, United States Code defines "foreign state" to include any "agency or instrumentality of a foreign state," which is in turn defined as any entity:

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or *a majority of whose shares or other ownership interest is owned by a foreign state* or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1603(b) (italics added). The questions presented involve the language in italics.

STATEMENT OF THE CASE

1. The Nature of the Case and the Proceedings Below

This case presents claims by citizens and residents of Costa Rica, Ecuador, Guatemala and Panama who contend that, while employed on banana farms in their home countries, they suffered personal injuries from exposure to dibromochloropropane (DBCP), a pesticide formerly used on banana trees.

The plaintiffs ("Respondents") filed their complaint on October 3, 1997, in the Circuit Court of the First Circuit of the State of Hawaii. The defendants are alleged manufacturers of DBCP and operators of the foreign banana farms where Respondents were employed.

Defendant Dole Food Company, Inc. ("Dole"), the lead petitioner in No. 01-593, impleaded Dead Sea Bromine Co., Ltd. ("DSB" or "Petitioner") and its subsidiary, Bromine Compounds Limited ("BCL"), the petitioners in No. 01-594, alleging that DSB and BCL (collectively, the "Dead Sea Companies" or "Petitioners") manufactured and sold DBCP to one or more defendants. Petitioners removed the action to the U.S. District Court for the District of Hawaii.

The removal was based on 28 U.S.C. § 1441(d), which provides that any foreign state may remove claims asserted against it to federal court. The FSIA defines "foreign state" to include an "agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a), which is, in turn, defined in pertinent part as "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state. . . ." *Id.* § 1603(b)(2). Petitioners contend that they are agencies or instrumentalities within the meaning of the Act, because during the period of time of the actions giving rise to the claims asserted against them, the State of Israel held a majority ownership interest in both Companies through a tiered ownership structure.

After the Dead Sea Companies removed the action, Dole filed a supplemental notice of removal alleging federal question jurisdiction. Pet. App. 5a, 58a. Respondents moved to remand on the ground that Petitioners are not agencies or

instrumentalities of Israel within the meaning of the Act and that there was no subject matter jurisdiction on the alternative theory set forth in Dole's notice. The defendants moved to dismiss the claims on the ground of *forum non conveniens*.

On September 9, 1998, the district court held that Petitioners do not qualify as agencies or instrumentalities of the State of Israel. *Id.* 71a. The court agreed with Petitioners' position – and that of every appellate court that has addressed the issue – that, although the State of Israel no longer owned a majority interest in the Companies by the time the suit was filed, an entity is within the purview of the FSIA if it was an agency or instrumentality of a foreign state during the period of time of the alleged conduct on which the claims for relief against it are based. *Id.* 62a-64a. Nevertheless, the court held that during this relevant time period, neither DSB nor BCL was an entity a "majority of whose shares or other ownership interest" were owned by the State of Israel. The court acknowledged that the State of Israel had "indirect ownership" of both companies, but, in its view, such ownership was insufficient to establish jurisdiction under the Act. *Id.* 71a.[1] The district court concluded, however, that it had federal question jurisdiction and granted the defendants' motion to dismiss for *forum non conveniens*. *Id.* 115a, 117a-118a.

The court of appeals affirmed the district court's conclusion that the Dead Sea Companies do not qualify as agencies or instrumentalities of Israel, on the ground that Israel was not the direct shareholder of either company. *Id.* 23a-24a. The court of appeals reversed the district court's finding of federal question jurisdiction and, accordingly, ordered that the action be remanded to state court. *Id.* 26a.

The Dead Sea Companies' status under the FSIA has been the subject of litigation in a number of other DBCP cases for the past eight years. In several lawsuits brought in Texas state

1. There is no dispute that DSB and BCL meet the other requirements of § 1603(b): they are entities separate from the State of Israel (§ 1603(b)(1)) and are not citizens of or created under the laws of the United States or any third country (§ 1603(b)(3)).

courts against the same principal defendants as in this case, thousands of individuals alleged that they too had labored on banana farms in Central America and other regions of the globe and had suffered injuries from exposure to DBCP. One or both Dead Sea Companies were impleaded and removed the cases to federal court, where they were consolidated. In response to a motion to remand, Judge Sim Lake of the U.S. District Court for the Southern District of Texas concluded that the Dead Sea Companies are agencies or instrumentalities under the FSIA and thereupon granted the defendants' motion to dismiss for *forum non conveniens*. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1315, 1318-19, 1340 n.33 (S.D. Tex. 1995); *Rodriguez v. Shell Oil Co.*, 932 F. Supp. 177, 180 n.6 (S.D. Tex. 1996). The U.S. Court of Appeals for the Fifth Circuit expressly affirmed Judge Lake's FSIA rulings in *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000) ("*Delgado*"), *cert. denied*, 532 U.S. 972 (2001). The Ninth Circuit, in its ruling below, rejected the holding of *Delgado*. Pet. App. 23a-24a.

Upon petitions for a writ of certiorari filed by the Dead Sea Companies and the defendants, this Court, after requesting the Solicitor General to submit a brief expressing the views of the United States,[2] granted the petitions.

2. Statement of Facts

a. The State of Israel Created DSB to Develop and Market the State-Owned Resources of the Dead Sea.

The Dead Sea is a 400-square-mile lake located between Israel and Jordan. Its rich mineral deposits, which include bromine, potassium, and magnesium, are among Israel's relatively few natural resources. Joint Appendix ("JA") at 70, 75, 80, 125-26. The State of Israel created DSB, a corporation organized under the laws of Israel and headquartered in Beer Sheeva, Israel, in 1955 to develop and market the Dead Sea's bromine resources in a manner consistent with Israel's national interests. JA 70-71.

2. Brief for the United States dated May 2002 ("U.S. Amicus Brief").

DSB has, since the early 1960s, operated under an exclusive subconcession granted by its parent company, Dead Sea Works Ltd. ("Dead Sea Works"), to extract bromine and bromine compounds from the Dead Sea. JA 70-71, 153-76. Dead Sea Works, in turn, holds the exclusive concession, granted by Israel's national legislature (the Knesset), to extract minerals from the Dead Sea. JA 124-50. The concession states that its object is "to regulate the efficient exploitation" of the "minerals of the Dead Sea," which as "natural resources of the State of Israel" should serve "the interests of the economy of the State." JA 125.

DSB's Articles of Association declare that the State possesses "Vital Interests" in the Company, including: (i) the "[s]upervision of the control of . . . natural resources for their efficient development and exploitation, including maximum application in Israel of the results of the investments, research and development"; (ii) the "[p]reservation of the character of the Company as an Israeli company whose center of business and management is in Israel"; and (iii) the "[p]revention of the achievement of a position of influence in the Company by . . . elements which may prejudice the State's foreign and defense interests." JA 107-08; *see also* JA 73-74.

b. During the Time of the Acts at Issue, the State of Israel Owned a Substantial Majority of DSB's Shares Through Its Ownership of DSB's Parent Corporation and Thus Had a Substantial Majority Ownership Interest in DSB.

The State of Israel held a substantial majority ownership interest in DSB during the time period 1968-95.[3] From 1968-75, the State held a 99% ownership interest in DSB. During this period: (i) the State owned 99% of the shares of Dead Sea Works, an Israeli company whose principal offices are in Beer

3. This time period is over inclusive for purposes of the questions presented in this case, in view of Respondents' allegation that they were first exposed to DBCP manufactured or distributed by the Dead Sea Companies after 1975, JA 24, and that DBCP was not used after the mid-1980s. JA 26.

Sheva, Israel and (ii) Dead Sea Works owned virtually all shares of DSB (99.9% of its shares), except for a single share owned directly by the State. JA 71-72, 82, 86.

From 1975-77, the State had a 98% ownership interest in DSB. During this period: (i) the State transferred its shares in Dead Sea Works to Israel Chemicals Ltd. ("ICL"), an Israeli company owned entirely by the State of Israel; (ii) ICL owned approximately 98% of the shares of Dead Sea Works, which continued to own 99.9% of the shares of DSB; and (iii) the State continued to directly own the one other share of DSB. JA 72, 82, 84, 86.

From 1978-83, the State had a 91% ownership interest in DSB. During this period: (i) ICL, which continued to be owned entirely by the State, reduced its ownership in Dead Sea Works to approximately 91%; (ii) Dead Sea Works continued to own 99.9% of the shares of DSB; and (iii) the State continued to directly own the one other share of DSB. *Id.*

From 1983-86, the State had an 88% ownership interest in DSB. During this period: (i) ICL, which continued to be owned entirely by the State, reduced its ownership in Dead Sea Works to approximately 88%; (ii) Dead Sea Works continued to own 99.9% of the shares of DSB; and (iii) the State continued to directly own the one other share of DSB. *Id.*

From 1986-1992, the State continued to hold an 88% ownership interest in DSB. During this period: (i) Dead Sea Works transferred one share of DSB to ICL and one share to each of four ICL subsidiaries to be held in trust for Dead Sea Works and (ii) all other ownership arrangements remained the same. JA 86.

From 1992-95, the State had a 70% (computed as 80.03% x 88%) ownership interest in DSB, including a Special State Share. During this period: (i) the State took the first steps to privatize ICL (up until this time, the State had owned 100% of ICL's shares) by offering 19.97% of ICL stock for public sale; (ii) the State continued to own the remaining 80.03% of ICL's shares; and (iii) ICL continued its ownership of 88% of Dead

Sea Works, which continued to own almost 99.9% of the shares of DSB. JA 72-73, 82, 86.

In connection with ICL's contemplated privatization, the State converted its one ordinary share of DSB into a Special State Share, which entitles the State to separately approve or disapprove: (i) any merger of DSB, (ii) any alteration of its structure; (iii) any acquisition or holding of 14% or more of its share capital; (iv) any acquisition or holding of 25% or more of such share capital; (v) the holding of share capital that confers upon its holder the right or ability to appoint directly or indirectly 50% or more of DSB's directors; and (vi) any action by ICL to sell DSB stock or assets. JA 74, 86-87, 104-09.

From 1995 to the present, the State has continued to hold the Special State Share but no longer holds a majority ownership interest in DSB. During this period: (i) the State sold an additional 24.9% of its ICL stock which, taken together with certain minor transactions in the intervening years, reduced the State's ownership in ICL to 48.5%; (ii) in March 1997, the State sold an additional 17% of ICL stock, which reduced the State's share ownership of ICL to 31.52%; (iii) Dead Sea Works transferred its shares in DSB to ICL, so that today both Dead Sea Works and DSB are direct subsidiaries of ICL; and (iv) the State continued to own the Special State Share in DSB that it was issued in 1992. JA 72-73, 84.

A chart illustrating the State of Israel's ownership of DSB in the period 1970-1985 is in the record (JA 95) and is annexed to this brief as an addendum.[4]

4. Dole also impleaded Petitioner BCL, a wholly or partially owned subsidiary of DSB from 1968 to 1995. During the period of time of the acts complained of, the State of Israel held a majority ownership interest in BCL, although the precise percentages varied somewhat and were slightly less than its percentage stake in DSB. The particular facts concerning BCL's ownership history are set forth in the record. JA 71-72, 86-88, 92-94. The arguments presented here with respect to DSB apply with equal force to BCL. For the sake of simplicity, however, this brief focuses on the State of Israel's ownership of DSB. If DSB is an instrumentality of Israel, the case was properly removed to federal court, and the judgment below must be reversed.

c. Pursuant to Israel's Government Companies Law, the State of Israel Controlled and Managed DSB Until Its Privatization in 1995 in the Same or Like Manner as a Company Directly Owned by the State.

DSB did not hold the status of an ordinary, private business corporation in Israel. Rather, because it was majority owned by the State, it was organized and operated pursuant to the Government Companies Law ("GCL"), an English translation of which is reproduced at JA 175-222. This statute, which was enacted in 1975, establishes the legal mechanism by which the State of Israel controls and supervises entities, such as Petitioners, a majority of whose shares are owned, directly or indirectly, by the State. The GCL's provisions with regard to companies that are directly owned by the State (referred to in the GCL as "Government Companies") apply "in like manner" to subsidiaries of such companies (referred to in the GCL as "Government Subsidiary Companies"), with very limited and specified differences. *See* GCL §§ 57, 1(a) (JA 208-09, 177). As discussed in detail below, until the privatization of ICL in 1995, the State of Israel, by virtue of its indirect ownership of a majority of DSB's shares, controlled the company in the same way and through the same administrative mechanism that it controlled companies a majority of whose shares were directly owned by the State.

The State, as owner of all or almost all of the shares of DSB's ultimate parent company, exercised substantial control and oversight over the Company through the GCL's approval and appointment mechanisms, and these incidences of ownership were not diminished by the fact that the State held its majority ownership interest through a tiered subsidiary structure. In this respect, the GCL vests the State of Israel with far greater direct control over subsidiaries of government-owned companies than is permitted under U.S. corporate law. *Post*, at 28-29.

(i) The State's Control Over Government-Owned Companies Such as DSB Involved the Highest Ranking Officials and Bodies of the Israeli Government.

As with directly owned companies, the Government's control over their subsidiaries, such as DSB, involved the highest ranking officials and bodies of the Israeli government. These officials and bodies included the Minister of Finance and other Ministers of the Government, *see* GCL §§ 1(a), 5, 6(3), 11(b), 15A(b), 18(a), 18B, 22(a)(3), 22(c), 24(a), 26(b), 34(a), 37(a), 44(c), 47(c), 57(1), 57(2) (JA 177-209); the Knesset Finance Committee, *see* GCL §§ 1(a), 5(b), 10, 11(b), 15A(a), 17 (JA 177-87); the Appointments Review Committee, appointed, in part, by the Minister of Finance and Attorney General, *see* GCL § 18B (JA 189); and a Cabinet Committee on privatization that included the Prime Minister, Minister of Finance and Minister of Justice, *see* GCL §§ 1, 59A (JA 177, 211). In addition, the Government Companies Authority (the "Authority"), whose director was an appointee of the Government upon the proposal of the Ministry of Finance, *see* GCL §§ 51-56 (JA 206-08), was charged with advising and assisting government-owned companies and their subsidiaries in the conduct of their business; monitoring their activities, course of business, financial position and wage policies; and communicating its findings to the Government's Ministers. GCL §§ 54, 57 (JA 207-09).

(ii) The Government Controlled DSB's Board of Directors in the Same or Like Manner as a Company Directly Owned By the State of Israel.

The Government controlled the Board of Directors of DSB through appointment of the directors of ICL (DSB's parent company) and approving the appointment of DSB's directors. GCL §§ 18(a), 57(3) (JA 188, 209). The approval of a director was to be made by the Minister of Finance and the Minister of

Industry and Trade,[5] after consultation with an Appointments Review Committee comprised of representatives of the Attorney General, an individual chosen from a select list of persons put forward by the Minister of Finance and Minister of Justice, and a representative of the Authority. GCL §§ 57(3), 18B(a) (JA 209, 189). Had DSB been directly owned by the State of Israel, the only difference would have been that its directors would have been appointed – in addition to being approved – by the Ministers. As it was, the GCL required the DSB directors to be appointed by the directors of DSB's parent companies, who themselves were subject to appointment by or approval of the Ministers. GCL §§ 18(a), 57(3) (JA 188, 209). In all other respects, the Government's control over the Board of a directly owned company (such as ICL) and the Board of its subsidiary (such as DSB) was the same. GCL § 57 (JA 208-09).

The Government, through the Minister of Finance, after consultation with the Authority, was empowered to set the remuneration of directors of both directly owned companies and their subsidiaries. GCL § 19 (JA 190-91). The Government, through the request of the Minister of Finance, the Minister of Industry and Trade, or the Authority, was also empowered to direct that a special meeting of their respective boards of directors be held to deal with any matters specified in the request. GCL § 26(b) (JA 195). Finally, the Authority sent a non-voting director to each board meeting to participate in the meeting as a director. GCL § 27(b) (JA 195).

5. The GCL defines the term "Ministers" – a term used throughout the statute – as "the Minister of Finance, together with the Minister designated by Law as responsible for the affairs of the company." GCL § 1(a) (JA 177). The record establishes that, at least for most of the time period at issue here, the "Minister designated by Law as responsible for the affairs" of DSB was the Minister of Industry and Trade, although during some time periods this Minister is referred to as the Minister of Trade and Industry or the Minister of Industry, Trade and Tourism. *See, e.g.*, Petitioners' Lodging ("L–") at L–17-19, L–22, L–25, L–45, L–47, L–49-50, L–159. For the sake of simplicity, the Brief will refer to this Minister as the Minister of Industry and Trade.

(iii) The Government Appointed and/or Approved the Appointment of the Chairman of the Board and the CEO of DSB in the Same or Like Manner as a Company Directly Owned by the State of Israel.

DSB's Chairman of the Board of Directors and its Chief Executive Officer[6] (who could not be the same individual) could be appointed only with the approval of the Minister of Finance and the Minister of Industry and Trade. GCL §§ 24(a), 37(a), 24(b) (JA 193, 201). The Ministers' approval could be given only after consultation with the State's Appointments Review Committee. GCL § 18B (JA 189). However, if the Government deemed it necessary to do so, the Government, after consultation with the Appointments Review Committee, was empowered to appoint a director as Chairman or to appoint the CEO. GCL §§ 24(a), 37(a) (JA 193, 201). The Government also had the power to remove the CEO from office. GCL §§ 42(a)(2), 42(a)(5a) (JA 202-03). These powers applied equally to companies directly owned by the State of Israel as they did to indirectly owned companies, such as DSB. GCL §§ 24(a), 37(a), 42(a) (JA 193, 201, 202-03).

(iv) Government Approval was Required for All Changes in DSB's Capital Structure, Business Purposes or the Purchase of Securities in the Same or Like Manner as a Company Directly Owned by the State of Israel.

Both routine and extraordinary changes in the capital structure of DSB required approval of the Government (the Prime Minister and his cabinet). With respect to such approvals, the only difference between a directly owned company and its subsidiary, such as DSB, was that the approvals

6. This brief uses the familiar title Chief Executive Officer or CEO, whereas the GCL uses the title general manager, which has the same meaning under Israeli law. JA 77, 193, 201-04.

for DSB were forwarded to the Government through its parent companies. GCL § 57(2) (JA 209). The Government could decide to approve the changes only if they were proposed to the Government by the Minister of Finance and the Minister of Industry and Trade and submitted to the Government with an opinion of the Authority. GCL §§ 11(b), 57(2) (JA 183, 209).

Such approvals were required for: (i) change in the objects (business purposes) of the company; (ii) increase in registered share capital; (iii) change in the rights attached to the shares; (iv) allotment of shares of the company, or consent to transfer of shares if such allotment or transfer would alter the balance of power among shareholders or confer upon a new shareholder ten percent or more of share capital or voting power or the right to appoint a director; (v) issuance of redeemable shares or convertible debentures; (vi) conversion of the company into a private company; (vii) reorganization or dissolution of the company; (viii) establishment of a subsidiary or purchase of another company's shares; and (ix) an undertaking to effect any act referred to above. GCL § 11(a) (JA 182-83).

(v) The Government Controlled the Budget and Business Plans of DSB in the Same or Like Manner as a Company Directly Owned by the State of Israel.

The Government Companies Law required DSB's board of directors, as well as all other Government companies, to draw up and submit an annual draft budget to the Authority, the Minister of Finance, the Minister of Industry and Trade, the State Comptroller, and, upon its request, the Knesset Finance Committee. GCL § 34 (JA 199-200). The GCL also required such companies to submit a report of the company's resources and the manner of their use; a balance sheet; and a profit-and-loss account, including the purposes to which profits were to be applied. GCL § 33(a) (JA 198-99). A decision as to the use of profits by a board of directors of either a directly owned Government company or its subsidiary was subject to approval by the Authority. GCL § 33(c) (JA 199).

(vi) The Government Required DSB to Use Consolidated Financial Reports in the Same or Like Manner as a Company Directly Owned by the State of Israel.

The Government Companies Law generally required consolidated financial reporting of all government companies and their subsidiaries. GCL § 33(a)(4) (JA 199). ICL, Dead Sea Works, and DSB, as commonly owned members of the same family of government companies, presented consolidated financial statements to the Government for its review. L–29, L–296, L–316.

(vii) DSB Had to Obtain Government Approval for the Appointment of its Auditors and Attorneys in the Same or Like Manner as a Company Directly Owned by the State of Israel.

The Authority was required to approve the accountant selected to serve as the auditor for DSB. GCL § 44(a) (JA 204). The appointment of a legal advisor to DSB also required the Authority's approval. GCL § 47(a) (JA 205). The Minister of Finance and Minister of Justice, with the approval of the Knesset Finance Committee, were empowered to prescribe rules as to the appointment of auditors and legal advisors. GCL §§ 44(c), 47(c) (JA 204-05). The GCL provisions imposed the same requirements on directly owned companies.

(viii) The Government Had Access to Information Concerning DSB in the Same or Like Manner as a Company Directly Owned by the State of Israel.

The Authority was empowered to receive any requested information from DSB and inspect its records and documents. GCL § 55 (JA 208). In addition, DSB's Chairman was required to submit to the Minister of Finance, Minister of Industry and Trade, and the Authority, twice yearly and at any time requested, a written report on the Company's activities and the work of its board of directors. GCL § 25 (JA 194).

(ix) DSB Had to Obtain Government Approval for Privatization in the Same or Like Manner as a Company Directly Owned by the State of Israel.

Government approval was also required before the sale of shares of subsidiary companies. GCL § 15A (JA 185). Thus, Government approval was required before ICL, Dead Sea Works, or DSB could sell their holdings of shares in Dead Sea Works, DSB, or BCL. The mechanism for approval involved proposals of the Minister of Finance and the Minister of Industry and Trade, submitted to the Government with the opinion of the Authority. *Id.*

d. The State of Israel Repeatedly Exercised its Far-Reaching Ownership Rights to Control DSB's Affairs.

The Government's extensive ability to supervise and regulate DSB in the same manner as a company directly owned by the State of Israel was by no means merely theoretical. The Government's pervasive control over DSB manifested itself in every facet of the company's operations and activities.

Acting through its highest officials and levels of government, the State of Israel: (i) regularly appointed employees of the Ministries of Finance and Industry and Trade to DSB's Board of Directors (L–1-22, L–344); (ii) issued directives as to the procedures to be followed by DSB's Board of Directors, prohibiting the appointment of alternative or substitute directors, terminating the tenure of directors for excessive absences and specifying the content of the Board's minutes (L–23-42); (iii) approved all DSB's directors (L–43-50); (iv) appointed the Authority's employees to participate in meetings of DSB's Board and its committees, such as the balance sheet committee (L–51-60); (v) monitored the attendance and the activities of members of the company's Board of Directors (L–61-73); (vi) approved the company's managing directors (CEOs) and their compensation (L–74-76); (vii) established procedures for the selection and remuneration of legal advisors, including the requirement that the Authority approve such

selection (L–77-108); (viii) established procedures for the selection and remuneration of auditors, including the requirement that the Authority approve such selection (L–109-17); (ix) restricted the circumstances and amounts of DSB's charitable contributions (L–131-50); (x) on multiple occasions required and/or strongly encouraged DSB to purchase Israeli products even if the cost was higher than the cost of non-Israeli goods (L–159-78); (xi) required DSB to freeze salaries and wages (L–179-81); (xii) approved or set the compensation to be paid to DSB executives, including retirement benefits (L–187-89); (xiii) established policies as to the use of company cars (L–190-97); (xiv) issued directives regarding hiring and promotion policies (L–214-21); (xv) encouraged DSB to become more efficient and to curb its expenses (L–222-34); (xvi) approved DSB's investments (L–235-44); (xvii) approved changes to DSB's capital structure and the issuance, sale and transfer of shares (L–245-78); (xviii) approved employee bonuses (L–279-88); (xix) approved the formation of a subsidiary (L–289-90); (xx) required changes in DSB's corporate charter (L–291-304); (xxi) restricted ICL from changing DSB's objects, transferring their shares, changing their share capital or selling their assets without Government approval (L–305-14); and (xxii) reviewed, approved and made recommendations with respect to DSB's budget, business plan and operations (L–315-29).

In sum, the record provides overwhelming evidence that the State's indirect ownership of the majority of the shares of DSB gave it pervasive oversight and control and other incidences of ownership over the company, and that the State exercised its powers in this regard on a routine basis on matters great and small.

SUMMARY OF THE ARGUMENT

I. DSB is an entity a majority of whose shares were "owned by" the State of Israel within the meaning of 28 U.S.C. § 1603(b)(2). Under the plain and ordinary meaning of the words "owned by," a majority of DSB's shares were "owned by" the

State through the State's ownership of the Company's parent corporations. In the context of tiered corporate subsidiaries, this Court has held that the statutory phrase "owned by" may be reasonably interpreted to include a shareholder's interest in the assets of its subsidiaries. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292, 298-99, 318-19 (1988). Similarly, this Court has used the words "sole shareholder" to describe a parent corporation's relationship to its wholly owned subsidiary's wholly owned subsidiary. *Franchise Tax Board of California v. Alcan Aluminium Ltd.*, 493 U.S. 331, 339 (1990) ("*Alcan*"). The court of appeals erred in holding that the State of Israel had to be a "direct" owner of DSB's shares. The statute imposes no such requirement. As the usage of the words "owned by" by this Court and many lower courts makes clear, the plain and ordinary meaning of these words encompasses direct as well as indirect ownership through a subsidiary.

Additionally, it is clear that the State of Israel held a "majority . . . ownership interest" in DSB within the meaning of 28 U.S.C. § 1603(b)(2). The plain and ordinary meaning of the term "ownership interest" encompasses the nature of the stake that a shareholder (such as the State of Israel) has in the subsidiaries of the corporation that the shareholder owns directly. This Court has used the term "ownership interest" in precisely this way, *see Alcan*, 493 U.S. at 335, as have numerous lower courts in a wide variety of contexts. This usage is supported by definitions of the term "interest" in legal and ordinary dictionaries, which establish that it is a broad and general term, encompassing a wide variety of ownership stakes, including those other than title to an asset.

Application of "owned by" and "majority ownership interest" in accordance with their plain and ordinary meanings would further the statutory purpose of allowing a uniform and principled resolution of claims of agency or instrumentality status across a wide variety of legal systems around the world. It would undermine Congress' legislative intent for an entity's entitlement to such status to turn on such legal formalities as whether title to its shares was directly vested in the foreign state

or vested in some other entity owned by the foreign state. Rather, Congress intended that an entity's entitlement to agency or instrumentality status should turn on whether the foreign state has a majority ownership stake, broadly defined, in the entity claiming such status.

The facts of the present case illustrate the importance of interpreting the statute in this manner. Under Israel's Government Companies Law, the State of Israel had direct powers of ownership and control over DSB in the same or like manner as entities that the State owned directly.

II. The State's ownership of DSB during the time period of its allegedly tortious conduct is sufficient for it to qualify as an "agency or instrumentality." Such an interpretation is consistent with the language of the statute because the use of the word "is" in 28 U.S.C. § 1603(b)(2) does not identify *when* an entity must be majority owned by the foreign state. *See, e.g., GE Capital Corp. v. Grossman*, 991 F.2d 1376, 1381 (8th Cir. 1993) ("use of the word 'is' [in § 1603(b)(2)] could speak to a variety of situations, including the time of the alleged wrongdoing"). The four circuit courts that have ruled on this issue have all held that state ownership at the time of an entity's alleged wrongdoing is sufficient for it to invoke "agency or instrumentality" status under the FSIA. Such an interpretation of § 1603(b)(2) is supported by the use of present tense verbs in other statutory provisions that clearly refer to the time period of the events giving rise to the lawsuit rather than the date on which a suit is commenced in court. *See, e.g.*, 28 U.S.C. § 1605(a)(2) ("causes a direct effect in the United States", a phrase that has uniformly been interpreted by this Court and lower courts as referring to the effect caused by alleged wrongdoing at the time of such conduct).

An essential purpose of the statute is to promote harmonious foreign relations, a purpose that Congress determined would be served by channeling all claims against foreign states and their agencies or instrumentalities to non-jury trial in federal courts. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493

(1983); 28 U.S.C. §§ 1330(a), 1441(d). Suits against an entity that was an agency or instrumentality of a foreign state at the time of its alleged wrongdoing implicate the foreign relations concerns that the statute was enacted to address. Such suits may raise "foreign policy concerns" to the extent they require a court in this country to "judg[e] the acts of another nation" regarding allegations that it, or its agencies or instrumentalities, committed a tort, breached a contract, or otherwise committed a legal wrong. *GE Capital Corp. v. Grossman*, 991 F.2d at 1381. *See also Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480-81 (5th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999). Failure to include such suits within the scope of the FSIA could, for example, subject the acts of an instrumentality of a foreign state to adjudication before a jury in a state court proceeding, a result the Act was specifically designed to foreclose. Accordingly, the statute should be interpreted to apply to claims asserted against entities owned by a foreign state at the time of the entity's alleged wrongdoing.

The application of immunity doctrines in other contexts in which a defendant's status has changed between the date of alleged wrongdoing and a lawsuit supports the interpretation of the statute urged here. For example, this Court has held that a government-owned vessel does not lose its sovereign status merely because it is sold to private owners prior to the litigation. *The Western Maid v. Thompson*, 257 U.S. 419, 432-33 (1922). Nor does a federal official or judge forfeit his or her qualified or absolute immunity from suit with respect to acts taken in an official capacity upon retirement from office or the bench.

ARGUMENT

I. DSB IS AN AGENCY OR INSTRUMENTALITY OF ISRAEL BECAUSE THE STATE OWNED A MAJORITY OF THE OUTSTANDING SHARES THROUGH ITS OWNERSHIP OF DSB'S PARENT CORPORATION AND HAD A MAJORITY OWNERSHIP INTEREST IN THE COMPANY.

The State of Israel possessed an overwhelming majority ownership interest in DSB during the time period in which Respondents allege that they were exposed to DBCP. From 1968 to 1983, the State held an ownership interest in DSB that ranged from 91% to 99%, by virtue of holding one share in DSB directly and virtually all of DSB's remaining shares through its parent company or companies. *Ante*, at 5-7. Through a tiered ownership structure, the State of Israel indirectly owned a substantial majority of DSB's shares. Plainly, DSB was an entity "a majority of whose shares or other ownership interest is owned by a foreign state." 28 U.S.C. § 1603(b)(2).

A. The State of Israel Owned a Majority of the Shares and Had a Majority Ownership Interest in DSB Under the Plain and Ordinary Meaning of These Words.

"The starting point in statutory interpretation is the 'language [of the statute] itself.'" *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (alteration in original, quoting *United States v. James*, 478 U.S. 597, 604 (1986)). The statutory language at issue here – "a majority of whose shares or other ownership interest is owned by a foreign state" – requires that the foreign state must own a majority of the "shares" or a majority of some "other ownership interest" in order for a company to be an agency or instrumentality of the state. 28 U.S.C. § 1603(b)(2). DSB meets both tests. Indisputably, the State of Israel indirectly owned a majority of DSB's shares, and, by virtue of owning the parent corporation's shares, had a majority ownership interest in DSB.

1. The Plain Language of the Statute Does Not Require a Foreign State To Directly Own a Majority of a Company's Shares.

The statute provides that an entity is majority owned by a foreign state, and thus is an "agency or instrumentality of a foreign state," if "a majority of [its] shares . . . is owned by a foreign state." 28 U.S.C. § 1603(b)(2). On its face, the statute makes no reference to any requirement that the ownership of shares be direct. Indeed, to require that the foreign state *directly* own a majority of the shares of the entity claiming status as an instrumentality would be to read an additional, substantive requirement into the statutory language. As stated by the U.S. Court of Appeals for the Fifth Circuit, "[t]he plain language of the statute simply requires 'ownership' by a foreign state. It draws no distinction between direct and indirect ownership; neither does it expressly impose a requirement of direct ownership." *Delgado*, 231 F.3d at 176.

Numerous courts, recognizing the statutory text compels this conclusion, have similarly interpreted the statute. *See, e.g.*, *Musopole v. South African Airways*, 172 F. Supp.2d 443, 447 (S.D.N.Y. 2001) ("where, as here, the Republic of South Africa owns an eighty percent beneficial interest in SAA, the fact that it does so indirectly, through its wholly owned subsidiary Transnet, rather than directly, is immaterial to the analysis"); *Watkiss v. Corporate Jets, Inc.*, 2001 WL 1344578, *2 (N.D. Oh. 2001) ("Eurocopter was indirectly owned by the French government through an intermediary corporation [and, thus, f]or purposes of the FSIA, . . . was owned by the French Government."); *In Re Clearsky Shipping Corp.*, 1999 WL 1021825, *5 (E.D.La. Nov. 8, 1999) ("neither the plain language of the statute nor the legislative history suggests that indirect majority ownership through intermediaries was outside the contemplation of § 1603(b)(2)"); *Talbot v. Saipem A.G.*, 835 F.Supp. 352, 353 n.2 (S.D. Tex. 1993) ("That Saipem's ownership by the Italian government is indirect is immaterial."). Indeed, a significant majority of the cases that have specifically addressed the tiering issue have held that indirectly majority-

owned tiered subsidiary entities are "owned" by the government under § 1603(b)(2). *Compare* Dead Sea Companies' Petition for a Writ of Certiorari at 12-14 (citing cases) *with id.* at 16 (citing contrary authority).

This Court has previously acknowledged that a statutory reference to "owned by" may reasonably be read to include the indirect ownership that a parent corporation – that is, a shareholder – has in the assets of a lower tiered subsidiary. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988) ("*K Mart*"). The statute at issue in *K Mart* prohibited the importation into the U.S. of "any merchandise of foreign manufacture if such merchandise . . . bears a trademark *owned by* . . . a corporation . . . created or organized within, the United States. . . ." 19 U.S.C. § 1526(a) (emphasis added). The Treasury Department's implementing regulations permitted, in certain circumstances, the importation of a product trademarked in the United States by the U.S. subsidiary of a foreign corporation. The validity of such a regulation turned on whether, in the parent-subsidiary context, the foreign corporate parent could be recognized as the true "owner" of the trademark, rather than the U.S. subsidiary in whose name it was registered in this country, permitting the conclusion that the merchandise did not bear a trademark "owned by" a U.S. corporation.

The Court, in three opinions reflecting a different majority for each of two holdings, agreed on one point: that the statutory phrase "owned by . . . a corporation . . . created or organized within . . . the United States" reasonably could be interpreted to refer either to the U.S. subsidiary that directly owned the U.S. trademark or its parent company that, through its subsidiary, indirectly owned the U.S. trademark. 486 U.S. at 292 (Kennedy, J.); *id.* at 298-99 (Brennan, J.); *id.* at 318-19 (Scalia, J.). All members of the Court agreed that Treasury's view that the foreign corporation should be deemed the "owner" of the trademark, notwithstanding that the mark was registered in the United States by its U.S. subsidiary, was a reasonable interpretation of the statute and did not conflict with its plain language. *Id.* In explaining why this is so, Justice Brennan stated:

> "The term ['owner'] is . . . nomen generalissimum, and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied." Black's Law Dictionary 996 (5th ed. 1979). But whether 'ownership' is the '[c]ollection of rights to use and enjoy property, including [the] right to transmit it to others,' or '[t]he complete dominion, title, or proprietary right in a thing,' or '[t]he entirety of the powers of use and disposal allowed by law,' *id.*, at 997, the parent corporation – not the subsidiary whose every decision it controls – better fits the bill as the true owner of any property that the subsidiary nominally possesses.

Id. at 298-99. *Accord id.* at 292 (Kennedy, J.); *id.* at 318 (Scalia, J.).

This Court's discussion and analysis in *Franchise Tax Board of California v. Alcan Aluminium Ltd.*, 493 U.S. 331 (1990) ("*Alcan*"), *affirming* 860 F.2d 688 (7th Cir. 1988), further illustrates common understanding and usage concerning concepts of ownership in the context of multi-tiered corporate relationships. At issue in that case was whether a foreign corporation, Alcan Aluminium Limited ("Alcan Limited"), had standing to raise claims on behalf of its second tier U.S. subsidiary, Alcan Aluminum Corporation ("Alcan Corp.").[7] This Court characterized Alcan Limited as the "sole shareholder" of Alcan Corp. 493 U.S. at 339. Moreover, responding to the argument that the second tier U.S. subsidiary was the only entity with standing under California law to bring a state court challenge to the tax scheme at issue, the Court noted that, as the "sole shareholder," Alcan Limited had "total control" over Alcan Corp. and, thus, could cause Alcan Corp. to bring such a challenge if it wished to do so. To disregard this reality, said the Court, "would be to elevate form over substance." *Id.* at 339.

7. Alcan Limited was the sole shareholder of Alcan Aluminium of Canada, Ltd., which, in turn, owned 100% of the shares of Alcan Corp. *See* 860 F.2d at 690 n.1.

The language employed by the Court in these decisions does not reflect isolated or idiosyncratic usage. In *Flink v. Paladini*, 279 U.S. 59, 63 (1929) ("*Flink*"), Justice Oliver Wendell Holmes, writing for the Court, noted that the word "owner" in the statute there at issue is an "untechnical word," and went on to observe that "'[i]n common speech the stockholders would be called owners'" of a corporation's assets. *See also Bangor Punta Operations, Inc. v. Bangor & Aroostoock R.R.*, 417 U.S. 703, 706 (1974) ("*Bangor Punta*") (Bangor Punta, a parent company, controlled and directed its third-tier subsidiary through Bangor Punta's "ownership of about 98.3% of the outstanding stock" of that entity); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 759 (1984) ("*Copperweld*") (noting that "a parent and its subsidiary are subject to common ownership" in holding that a parent corporation cannot conspire with its subsidiary to violate the Sherman Anti-Trust Act); *Fletcher's Cyclopedia of the Law of Private Corporations* § 43, at 733-34 (perm. ed. rev. vol. 1999) ("The holding company may be regarded as the 'owner' of the subsidiary's property. . . .").[8]

The everyday use of the word "own" to include the interest of a corporate parent more than one step removed from a subsidiary entity is well illustrated by language chosen in this very litigation by Respondents' counsel. In their brief to the court of appeals below, Respondents described DSB as being "majority-owned by the State of Israel." Brief of Plaintiffs-Appellants/Cross-Appellees dated October 15, 1999 at 7.

Numerous courts have accepted tiered ownership as meeting the requirements of § 1603(b)(2) with no little or no discussion,

8. Other examples of the common usage of "own" to include indirect ownership of tiered subsidiary entities may be found in the language of government regulations. For example, Securities and Exchange Commission regulations generally require that publicly traded companies "consolidate entities that are *majority owned*" for financial reporting purposed. 17 C.F.R. § 210.3A-02(a) (emphasis added).

as though the conclusion were obvious. *See* Dead Sea Companies' Petition for a Writ of Certiorari at 15-16 (citing cases). For example, in *Allendale Mutual Ins. Co. v. Bull Data Systems, Inc.*, 10 F.3d 425, 427 (7th Cir. 1993), in reference to two second tier subsidiaries of France, Chief Judge Posner paused to consider whether the court had jurisdiction under the FSIA and concluded that "[t]here is no problem" because § 1603(b)(2) "confers federal jurisdiction over civil suits against foreign states as defined by the [FSIA], and the Act's definition includes companies a majority of whose shares are owned by a foreign state." The relative lack of analysis in many of these decisions confirms that the understanding of the relationship between tiered parent-subsidiary corporate entities reflected in this Court's discussions in *K Mart*, *Alcan*, *Flink*, *Bangor Punta* and *Copperweld* quite naturally applies to the common sense reading of the statute. These decisions recognize that, under the plain and ordinary meaning of its language, the Act's application turns on the substance of the foreign state's ownership and resulting control, not the form of the state's ownership.

The United States has argued that the word "direct" must be read into the statute in order to bring it into conformity with "basic legal understandings" that "'[a] corporation and its stockholders are generally to be treated as separate entities,'" U.S. Amicus Brief at 7 (quoting *Burnet v. Clark*, 287 U.S. 410, 415 (1932)), and "bedrock principles of corporate law." *Id.* at 8 (quoting *United States v. Bestfoods*, 524 U.S. 51, 62 (1998)). This contention is entirely misplaced. There is no dispute that the State of Israel is a separate entity from a corporation in which it owns a majority of the shares, directly or indirectly, and that neither DSB's immediate corporate parent nor the State are answerable for the company's allegedly tortious acts. Neither fact has any relevance to whether, in common parlance and understanding, a majority of DSB's shares were "owned by" the State of Israel.

The discussion in *Delgado* and many of the other lower court FSIA tiering cases cited above mixes reference to the State's indirect ownership of the subsidiary's shares with a

discussion of the State's "ownership interest." In fact, the two statutory phrases are closely related and reinforce the argument that indirect share ownership is encompassed by both. Congress could have chosen to provide that only an entity "a majority of whose shares are owned by a foreign state" is within the purview of the FSIA's reach. It chose instead immediately thereafter to add the notably broad and general phrase "or other ownership interest." Its presence in the statutory definition lends particular weight to the argument that "share ownership" should be construed to include indirect ownership. Surely, Congress' decision to include any entity that possesses a majority ownership interest in a tiered subsidiary, of whatever kind or nature, strongly supports the interpretation that share ownership should be read in an "untechnical" way, *see Flink v. Paladini*, 279 U.S. at 63, to include indirect ownership.

2. The Words "Majority . . . Ownership Interest," in Their Plain and Ordinary Meaning, Refer to a Broad Range of Ownership Rights and Relationships That Encompass the Nature of the Stake that a Majority Shareholder of a Corporation Has in an Entity Owned by that Corporation.

An alternative and independent ground for deeming DSB to be an "agency or instrumentality" under the Act is that the State of Israel had a "majority . . . ownership interest" in DSB within the meaning of § 1603(b)(2). The FSIA does not specifically define the term "ownership interest." Under settled principles of statutory construction, that term should be construed in accordance with its "ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993); *see also Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207 (1997); *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *Perrin v. United States*, 444 U.S. 37, 42 (1979).

An "interest" is the "most general term that can be employed to denote a right, claim, title, or legal share in something." *Black's Law Dictionary* at 729 (5th ed. 1979). "More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, *but less than title*." *Id.*

(emphasis added). *See also Webster's Ninth New Collegiate Dictionary* at 631 (1985) (defining "interest" as "right, title, or legal share in something [or] . . . participation in advantage and responsibility"). While it did not directly hold title to DSB's shares, the State of Israel clearly had an interest in the Company that allowed the State to accrue an advantage from its success and control its management and affairs.

The ordinary meaning of the term "ownership interest" quite plainly encompasses the stake that a shareholder has in its corporation's subsidiary. In *Alcan*, this Court used the term precisely this way when it characterized as an "ownership interest" the nature of the interest that Alcan Limited had in Alcan Corp., its second tier subsidiary. 493 U.S. at 335.

Numerous other courts, ruling in a wide range of contexts, have also used the term "ownership interest" to describe the stake of a corporate entity, or the shareholder of such an entity, in a multi-tiered subsidiary corporation. In a case involving an insolvent bank with several tiered subsidiaries, Maryland's highest court noted that the bank's receiver had the powers of the bank and "of any corporation in which [the bank] . . . has a 100% *ownership interest*, directly or through first, second, or third tier subsidiaries." *Gay v. State of Maryland Deposit Insurance Fund Corp.*, 308 Md. 707, 719, 521 A.2d 1205, 1210 (1987) (emphasis added). New York's highest court has used the term "ownership interest" to encompass both direct ownership of shares in a corporation and the nature of the interest acquired in a corporation by owning shares in another entity that owns shares in the corporation, as in the sentence "he had a direct ownership interest in it through personally held shares and also an indirect ownership interest in it through another company he owned . . . which held . . . shares." *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 464, 522 N.E.2d 40, 42 (1988). South Dakota's highest court, describing the purchase by a subsidiary of Edward D. Jones & Co. ("Jones") of one-third of the shares in a small oil exploration company, characterized the transaction as one in which "Jones, through an affiliated subsidiary, purchased a one-third ownership interest

in [the oil company]" and stated that "Jones paid $5 million . . . for its ownership interest in [the oil company]." *Schaffer v. Edward D. Jones & Co.*, 521 N.W.2d 921, 924 (S. Dak. 1994).[9]

The United States asserts that Congress "typically" uses language to signify its intention that a broad reading should be given to such words as "owns." U.S. Amicus Brief at 9 n.4. As noted above, the inclusion of the phrase "or other ownership interest" serves precisely such a function and makes clear, should clarification be needed, that the foreign state need not directly own the shares of a tiered subsidiary in which it owns a majority ownership interest.

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9. *See also Harris v. United States*, 175 F.3d 1318, 1321 (11th Cir. 1999) (in a tax case, the court stated that a shareholder of a subsidiary's publicly-owned parent company had an "indirect ownership interest" in the subsidiary); *Access Now, Inc. v. AMH CGH, Inc.*, 2001 WL 1005593 *1 (S.D.Fla. May 11, 2001) (in an action brought under the Americans with Disabilities Act, the court described the action as one stating claims "against medical facilities, in which [defendant] Tenet Healthcare Corporation . . . had, directly or though one of its subsidiary corporations, a majority ownership interest"); *Ferro Union, Inc. v. United States*, 44 F. Supp.2d 1310, 1327 n.39 (Int'l Trade 1999) (in an antidumping case, court described a situation in which a "Mr. X owned 25 percent of MG . . . [, which] owned a 20 percent share of six subsidiary Petitioners" as one in which "Mr. X's indirect ownership interest" in these subsidiary Petitioners was less than the requisite 20 percent under the applicable legal standard); *Bowers v. Wurzburg*, 202 W.Va. 43, 47, 501 S.E.2d 479, 483 (1998) (two corporations that owned 69.9% of the shares of a retailing corporation through an intervening holding corporation described as having an indirect "ownership interest" in the retailing corporation); *Fertilizantes Fosfatados Mexicanos, S.A. v. Chen*, 1992 WL 204394 *1 (S.D.N.Y. 1992) (in a judgment collection case, the court used the term "controlling ownership interest" to describe the relationship between the principal shareholder of a parent corporation and the parent corporation's subsidiaries); *Trump Taj Mahal Associates v. Costruzioni Aeronautiche Giovanni Agusta S.p.A.*, 761 F. Supp. 1143, 1150 (D.N.J. 1991) (foreign state has a majority "ownership interest" in a subsidiary of a state-owned corporation), *aff'd*, 958 F.2d 365 (3d Cir.), *cert. denied*, 506 U.S. 826 (1992).

3. Israel's Government Companies Law Established the Legal Framework Pursuant to Which the State of Israel Owned and Controlled DSB and Provides Additional Support for the Conclusion that the Plain and Ordinary Meaning of the Terms "Owned" and "Ownership Interest" Encompass the Nature of the State's Interest in the Company.

Under the plain and ordinary meaning of the statutory language at issue here, it should be sufficient that the State of Israel indirectly "owned" a majority of DSB's shares and thereby had a "majority . . . ownership interest" in the Company. Yet, in applying the statutory language to the State of Israel's ownership of DSB, the legal framework under which the State owned the Company provides additional support for the conclusion that the Company's shares can fairly be said to have been "owned by" the State and that the State had a "majority . . . ownership interest" in the Company. Under this legal framework, which was established by Israel's Government Companies Law, the State had far more of the qualities of an "owner" of the Company than would a similarly situated indirect shareholder under American law. Since *K Mart*, *Alcan*, *Flink*, *Bangor Punta* and all of the other cases discussed above that construed or used the terms "owned" or "ownership interest" as encompassing the nature of the stake that an ultimate shareholder has in a tiered subsidiary reached this conclusion under American corporate law principles, the conclusion is reached even more readily under the legal framework under which the State of Israel held its ownership interest in DSB.

Under the law of Delaware, for example, a shareholder's statutory rights, even with respect to the corporation in which it directly holds shares, are quite limited.[10] Significantly, in this

10. The Delaware General Corporations Law ("Del. GCL") provides that the "business and affairs" of the corporation shall be "managed by or under the direction of the board of directors." Del. GCL § 141(a). Thus, "'[a] fundamental precept of Delaware corporation law is that it is the board of directors, and neither the (Cont'd)

context, a shareholder of a Delaware corporation has no formal right to elect or approve the appointment of directors of subsidiary corporations, attend their annual meetings, vote on changes to their corporate charters, or otherwise interact with them in a direct fashion. In these respects, Delaware corporate law is similar to that of New York and other important commercial centers in the United States.

In marked contrast, under Israel's Government Companies Law, the State of Israel, by virtue of its majority ownership interest in DSB, had numerous direct levers of control over and incidences of ownership with respect to that entity. With immaterial exceptions, the GCL's provisions with regard to companies directly owned by the State applied "in like manner" to subsidiaries of such companies. *Ante*, at 8-14. The State, acting through its senior ministers and the Government Companies Authority, controlled the board of directors of DSB, *ante*, at 9-10, appointed or approved the appointment of its Chairman of the Board and CEO, *ante*, at 11, had approval authority over all changes to its capital structure, business purposes or purchase of securities, *ante*, at 12, controlled its budget and business plans, including the purpose to which profits were applied, *ante*, at 12, approved the appointment of its auditors and attorneys, *ante*, at 13, and had plenary access to information

(Cont'd)
shareholders nor managers, that has ultimate responsibility for the management of the enterprise.'" Ward, *Folk on the Delaware General Corporations Law* at GCL-IV-14 (4th ed. 2002-2 Supp.) (citation omitted). One of the few rights a shareholder has is to attend, in person or by proxy, the annual meeting of stockholders to elect directors. Del. GCL § 211(b). Even at the annual meeting, however, stockholders have no right to ask questions, *see Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 146 (Del. 1997), nor do they have a right to call a special meeting. Del. GCL § 211(d). Apart from voting for the board of directors at the annual meeting, a shareholders' other rights are, in essence, limited to seeking to enforce the directors' fiduciary duties and voting on amendments to the corporate charter, a merger, sale of substantially all of the corporation's assets, or dissolution. *Id.* §§ 242(b)(1), 275(B), 271(A).

concerning its affairs, *ante*, at 13. The record indicates, moreover, that these rights were by no means theoretical but were, in fact, routinely exercised in a myriad of ways and contexts. *See ante*, at 14-15.[11] Thus, by virtue of owning DSB's parent corporation, the State of Israel had far more day-to-day input and control over DSB than a majority shareholder in the United States would have over a corporation in which the shareholder held a *direct* majority stake.

In view of the State of Israel's creation of DSB, its overwhelming majority ownership of the Company and its pervasive control and oversight through the mechanism of the Government Companies Law, the State of Israel, in Justice Brennan's words, "fits the bill as the true owner" of DSB. *K Mart*, 486 U.S. at 299. Like the ultimate parent entity in *Alcan*, the State was the "shareholder" of DSB, 493 U.S. at 339, with an indisputable majority "ownership interest" in the company. *Id.* at 335. To disregard these realities in interpreting the language of § 1603(b)(2) "would be to elevate form over substance." *Id.* at 339. Since the State had all of the incidents of "ownership" (and then some) that a shareholder has in a corporation in which it owns a majority of shares, it clearly "owned a majority of the shares" and, as well, owned a "majority . . . ownership interest" under any common sense definition of those terms.

B. The Interpretation of "Owned By" and "Majority . . . Ownership Interest" Urged Here Is Consistent With the FSIA's Legislative History and Would Further the Statutory Objectives.

The interpretation of "owned by" and "majority . . . ownership interest" urged here is fully consistent with the

11. The United States erroneously assumes that the same basic principles of United States corporate law, which in any event in no way preclude the interpretation urged by DSB, would apply to the relationship between the State of Israel and DSB under Israeli law. U.S. Amicus Brief at 8 & 12 n.5. Thus, the suggestion in the U.S. Amicus Brief that a "different approach" might be appropriate under legal regimes dissimilar to that of the United States, *id.* at 12 n.5, is in fact quite applicable.

legislative history of the statute and would further its objectives. An important goal of the FSIA was to define broadly the universe of entities intended to come within its scope. Congress was concerned that suits against such entities, and particularly those suits arising out of commercial activities where the defense of sovereign immunity would not be available, implicate the foreign relations of the United States insofar as they may compel a court to pass judgment on the acts of a foreign sovereign or its agencies or instrumentalities. *Post*, at 32. Congress was also cognizant of the fact that foreign sovereigns were increasingly establishing separately constituted state-owned and controlled enterprises to perform a variety of commercial functions. Congress intended that the definition of "agency or instrumentality" cover a broad spectrum of these state-owned entities. *Post*, at 33. Congress also intended to move away from the rigid application of the "separate entity" rule and an era of judicial decisions that had favored form over substance, by eliminating the significance of separate incorporation in the context of foreign sovereign immunity. *Post*, at 36. A cramped interpretation of "owned" in § 1603(b)(2), reading into the statute the limiting modifier "directly owned," and of "ownership interest" would work against all these Congressional objectives.

1. The Objective of the FSIA was to Create a Broad-Based Scheme Encompassing All Entities in Which Foreign States Possessed a Majority Ownership Interest.

Congress enacted the FSIA to establish uniform "standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) ("*Verlinden*"). The entities to be accorded foreign sovereign status under the Act are broadly defined to include the foreign sovereign and its political subdivisions, agencies, and instrumentalities. 28 U.S.C. § 1603(b).

The Act provides that all such foreign sovereign entities shall be immune from the jurisdiction of courts in the United

States, subject to various exceptions. 28 U.S.C. § 1604. In fact, the exceptions describe a fairly wide range of cases in which foreign states and their agencies and instrumentalities may be sued, as, for example, where the claims arise out of commercial activities conducted or having a direct effect in the United States. *Id.* § 1605(a)(2). Where an exception applies, such suits may be maintained, but the Act accords certain protections to the foreign sovereign entities. Among other things, they are entitled, pursuant to 28 U.S.C. §§ 1330(a), 1441(d), to federal court jurisdiction, by way of a grant of original jurisdiction[12] and a broad right of removal,[13] and to a non-jury trial.[14]

The provision of a federal forum for such suits is designed to protect the "foreign relations of the United States," *Verlinden*, 461 U.S. at 493; to reduce the potential for conflicting results, *id.* at 497; and to "avoid any local bias . . . inherent in state court proceedings." *In re Delta America Re Ins. Co.*, 900 F.2d 890, 893 (6th Cir.), *cert. denied*, 498 U.S. 890 (1990). Such suits may raise "foreign policy concerns" to the extent they require a court in this country to "judg[e] the acts of another nation" regarding allegations that it, or its agencies or instrumentalities, committed a tort, breached a contract, or otherwise committed a legal wrong. *GE Capital Corp. v. Grossman*, 991 F.2d 1376, 1381 (8th Cir. 1993). All of these concerns are implicated in a judicial interpretation of the reach of the Act's definition of "agency or instrumentality" of a foreign state.

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12. "Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487, at 13, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611.

13. "In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum . . ." *Id.* at 32, *reprinted in* 1976 U.S.C.C.A.N. at 6631.

14. "Actions tried by a court without [a] jury will tend to promote a uniformity of decision where foreign governments are involved." *Id.* at 13, *reprinted in* 1976 U.S.C.C.A.N. at 6611-12.

Congress thus intended the FSIA to create a comprehensive set of ground rules for suits against foreign states and all entities in which such states have a substantial interest, which Congress chose to define, in part, as a majority ownership interest. It did so, because it perceived that suits against such entities, especially in those commercial cases where sovereign immunity was not to be available, and where the actions of state-owned entities would thus be subject to judicial process, adjudication and enforcement, have obvious potential to implicate significant foreign relations interests, requiring the protections afforded by a federal forum and non-jury trial. It is this background and context against which the provisions of the FSIA must be interpreted. *See generally Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (when seeking to ascertain the intent of statutory language, particular attention should be paid to the specific context in which the language is used as well as the broader context of the statute as a whole).

2. A Narrow Interpretation of "Owned By" and "Ownership Interest" Is Inconsistent With the Purposes of the Act.

The House Report on the FSIA, H.R. Rep. No. 94-1487, 94th Cong., 2nd Sess., *reprinted in* 5 U.S.C.C.A.N. 6604 (1976), makes plain that Congress intended to cast the agency or instrumentality net broadly. *See, e.g., Verlinden*, 461 U.S. at 488; *Ruggiero v. Compania Peruana De Vapores*, 639 F.2d 872, 877-78 (2d Cir. 1981) (Friendly, J.). The Act was crafted to cover a myriad of governmental, social, and economic systems. *See* H.R. Rep. No. 94-1487 at 15-16, *reprinted in* 1976 U.S.C.C.A.N. at 6614. The Report notes the widely varying types of enterprises that Congress had in mind (including trading enterprises, shipping lines, airlines, steel companies, and mining enterprises) and reflects Congress' understanding that these entities would be engaged in commercial activities for profit. H.R. Rep. No. 94-1487 at 16, *reprinted in* 1976 U.S.C.C.A.N. at 6614-15; *see also* S. Rep. No. 94-1310 at 15-16 ("entities which meet the definition of 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state

trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association").

The circumstances of DSB's ownership, in which the foreign state chose to hold its ownership interest through a tiered corporate structure, are far from unique. As this Court observed in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983), "[i]ncreasingly during this century, governments throughout the world have established separately constituted legal entities to perform a variety of tasks." 462 U.S. at 624 (citing Friedmann, *Government Enterprise: A Comparative Study* at 333-34 (W. Friedmann & J.F. Garner eds. 1970) ("Friedmann")); *see also* Friedmann at 307 ("The variety of forms in which the various States have, at different times, proceeded to establish public enterprises is almost infinite. . . ."); *id.* at 333-34 (noting use of tiered subsidiary structures). Were this Court to hold that a foreign state does not have an ownership interest in a company owned through an intervening holding corporation, it would significantly restrict the scope of the statute and make its application turn on a formalistic distinction as to how a government chooses to structure its ownership interest in a state-owned company that has nothing to do with the nature or extent of the government's real life interest in or control over the entity.

There is no reason to assume that the strength of a foreign state's interests or the scope of its involvement dissipate when it employs a tiered ownership structure. *See* Report of the Working Group of the American Bar Association, *Reforming The Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l Law 489, 523 (2002). For example, Mexico, the sole owner of that nation's petroleum resources, formerly carried out all production, manufacturing, transportation and distribution through the state petroleum company Petroleus Mexicanos ("Pemex"). *See Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 653-54 (9th Cir. 1996). In 1992, Mexico restructured its ownership by establishing Pemex as a holding company with four operating subsidiaries.

Id. Surely, Mexico's interests in its state-owned petroleum enterprise were not materially different before and after that reorganization. Similarly, Honduras holds interests in its lumber industry through a tiered ownership structure, *see Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 382 (5th Cir. 1999), and Venezuela holds its interest in its national oil industry through a tiered ownership structure. *See Lopez Del Valle v. Gobierno de la Capital*, 855 F. Supp. 34, 35-6 (D.P.R. 1994).

There is no reason to conclude that these foreign states have any less interest in their critical state-owned resources as a result of their decision to structure the corporate form in which they are held and managed. Nor is there reason to conclude that a suit filed against a tiered subsidiary has the potential to implicate interests that are materially different from those potentially implicated by suits against directly owned corporate entities. In this case, the State of Israel created DSB in 1955 to develop and market primary natural resources of that nation in a manner consistent with the national interests. The Congressional policy concerns underlying the FSIA are in no way diminished by the fact that Israel chose to own and control the company through a tiered corporate ownership structure.

The Ninth Circuit did not articulate any rationale as to why a company that is 100% owned by a foreign state should be entitled to remove a case to federal court but a wholly owned subsidiary of that company should not. Such a result would contravene the clear and significant Congressional objective that entities in which a state holds a majority ownership interest should be within the purview of the Act. Similarly, it would be illogical to read a direct ownership requirement into the statute with the result that a company 51% owned by a foreign state would be entitled to the Act's protections, but a second tier subsidiary in which the state had 100% ownership, albeit indirectly, would not. Under the clear language of statute, the sole focus should be on whether the State's ownership interest, however structured, is greater than 50%. As one court

has observed, the "FSIA specifically provides that 'corporate form' – in and of itself – be immaterial." *O'Connell Machinery Co., Inc. v. M.V. "Americana"*, 566 F. Supp. 1381, 1385 (S.D.N.Y. 1983), *aff'd*, 734 F.2d 115, 116-17 (2d Cir.), *cert. denied*, 469 U.S. 1086 (1984). Because there is "no policy reason why tiering through an intermediary majority owned by a foreign state should not be permitted under the FSIA," *Linton v. Airbus Industrie*, 934 S.W.2d 754, 762 (Tex. Civ. App. 1996), there is no reason to depart from the plain language of the statute, which requires only that a foreign state have a majority "ownership interest" for the FSIA to apply. The foreign sovereign's internal, administrative decision as to how its ownership interest is held or structured under its form of government and its legal and economic systems is immaterial to the purposes and objectives of the statute and should not control the statute's application to an entity that is majority owned by the foreign state.

3. A Narrow Interpretation Would Represent a Return to the Separate Entity Rule That Congress Rejected in Enacting the FSIA.

There is an additional reason why the Ninth Circuit's interpretation of the statute is not consistent with its origin and purpose. Prior to the FSIA, the "separate entity" rule often prevented foreign corporations from asserting sovereign immunity. Premised on the assumption that states do not perform sovereign acts through corporations, this doctrine provided that corporations owned by a sovereign state were presumed to be separate entities and thus not entitled to assert sovereign immunity. *See, e.g., Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 388 (1939) ("the [federal] government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work"); *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922) ("An instrumentality of Government he might be and for the greatest ends, but the agent, because he is [but an] agent" may not assert sovereign immunity); *Bank of United States v. Planters' Bank*

of Georgia, 22 U.S. 904, 907 (1824) (bank incorporated by and partly owned by the State of Georgia held not entitled to assert sovereign immunity); Comment, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 Yale L. J. 1148, 1152-53 (1954); Fensterwald, *Sovereign Immunity and Soviet State Trading*, 63 Harv. L. Rev. 614, 619 (1950).

As governments increased their use of corporate entities during the last century to perform a variety of tasks to further their interests, the "restrictive" theory of sovereign immunity emerged. Under that approach, immunity from suit is limited to claims based on the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts. *Verlinden*, 461 U.S. at 487. Under the "restrictive" theory, courts began to look at various factors to determine whether a corporation, owned or controlled by a government, engaged in either sovereign or commercial acts. While this test appears straightforward, courts applied it in an inconsistent manner. *Id.* at 487-88.

The FSIA was enacted, in large part, to codify the restrictive theory of immunity. *See id.* at 488; H.R. Rep. No. 94-1487, at 7, *reprinted in* 1976 U.S.C.C.A.N. at 6605. And by including an "agency or instrumentality" of a foreign state as an entity subject to the FSIA's procedural protections (*e.g.*, federal court jurisdiction) and, in appropriate cases, immunity from suit, Congress unequivocally rejected the separate entity rule and sought to end the confusion surrounding the conflicting applications of that doctrine to claims of foreign sovereign immunity. *See* 28 U.S.C. § 1603(b)(1) (requiring that an "agency or instrumentality of a foreign state" be "a separate legal person, corporate or otherwise" from the foreign state).

In enacting the FSIA, Congress chose to provide procedural protections both to foreign states and their legally distinct agencies or instrumentalities and to regulate claims of sovereign immunity of both, and the ground rules for permitting suits in those cases where immunity from suit is not available, under the same uniform standards. It is thus clear from the structure of the statute that it sought to eliminate the fact of separate

incorporation from the immunity analysis and, instead, focus the court's inquiry on the substance of the State's involvement (*e.g.*, does it own a majority of the shares or other ownership interest of the entity) and the character of the action at issue in the case (*e.g.*, is it a "commercial" act that "cause[d] a direct effect in the United States," *id.* § 1605(a)(2)).

By rejecting the separate entity rule, the Act can be fairly said to have repudiated its underlying doctrinal premise, *i.e.*, that the mere fact of separate incorporation should have dispositive significance in the application of the doctrine of foreign sovereign immunity. The Ninth Circuit's interpretation of the statute – which attaches dispositive significance to the fact that DSB is incorporated as a "separate entity" from its parent corporation – thus represents a step backwards toward the formalistic approach rejected by Congress. Instead of focusing judicial attention on the substantive role of the State and the nature of the conduct undertaken by an entity majority owned by a foreign state, as the statute requires, the Ninth Circuit's approach exhumes the separate entity concept and ignores the Congressional effort to replace that discredited doctrinal framework with new statutory standards.

C. The Ninth Circuit's Rationale for Interpreting the Terms "Owned" and "Majority ... Ownership Interest" so as to Exclude the Interest That a Foreign State Has in State-Owned Companies Held Through a Tiered Subsidiary Structure Does Not Make Sense.

The court of appeals based its decision in this case principally on its conclusion that it was bound by its prior decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.) ("*Gates*"), *cert. denied sub nom.* 516 U.S. 869 (1995), *see* Pet. App. 22a-24a, a case that presented a distinctly different and, indeed, unusual factual backdrop. In *Gates*, the "original" owning entity – the Alberta Pork Producers Development Corporation ("Alberta Pork") – was neither a sovereign state nor a political subdivision, nor was it owned, directly or indirectly by a state or political subdivision. It was, however,

held to be an "organ" of a political subdivision (the Province of Alberta). *See* 28 U.S.C. § 1603(b)(2) (referencing an entity which is "an organ of a foreign state or political subdivision"). Alberta Pork's subsidiary was unable to assert its status as an "agency or instrumentality" based solely on the language of § 1603(b)(2) (referencing majority ownership) because its parent corporation was not owned, directly or indirectly, by a foreign state or political subdivision. Rather, it contended that since its parent, Alberta Pork, was an "organ" of a state, the parent was therefore an "agency or instrumentality of a foreign state" by virtue of § 1603(b). And therefore, went the argument, Alberta Pork was itself a "foreign state" by virtue of § 1603(a), which provides that a "foreign state" includes an "agency or instrumentality of a foreign state" as defined in § 1603(b). On this basis, Alberta Pork's subsidiary argued that it was itself owned by a "foreign state" (Alberta Pork). It is this far more complex statutory analysis, based upon the arguably recursive inter-relationship between §§ 1603(a) and 1603(b)(2), that *Gates* rejected, on the ground that it could unduly expand the reach of the Act to entities far removed from state ownership. *Gates*, 54 F.3d at 1462.[15]

The court in *Gates* never focused on the language of § 1603(b)(2) alone. The facts there did not present a case in which a foreign sovereign entity had any ownership interest, direct or indirect, since Alberta did not directly or indirectly own either Alberta Pork or its subsidiary. However, in the ruling below, the Ninth Circuit interpreted *Gates* more broadly, to require direct share ownership by the foreign state – a result not required by the facts of *Gates*.

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15. Although this recursive inter-relationship between §§ 1603(b)(a) and 1603(b)(2) has been adopted by several courts, *see, e.g., In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932 (7th Cir. 1996), Petitioners here base their argument on the plain meaning of "owned" and "ownership interest." Accordingly, the Ninth Circuit's critique of the recursive interpretation in *Gates* has no bearing on Petitioners' argument.

Although it placed primary reliance on *Gates*, the Ninth Circuit did briefly address DSB's contention that the State of Israel held a "majority . . . ownership interest" in the Company. The court rejected that argument, because, in the court's view, it would "make the majority-shareholder requirement superfluous." Pet. App. 23a. Yet the canon "'a legislature is presumed to have used no superfluous words,'" *Bailey v. United States*, 516 U.S. 137, 145 (1995) (quoting *Platt v. Union Pacific R.R.*, 99 U.S. 48, 58 (1879)), is merely an aid to interpretation and cannot be used to alter the plain meaning of statutory language. *See Connecticut National Bank v. Germain*, 503 U.S. 249, 254 (1992); *Chickasaw Nation v. United States*, 122 S. Ct. 528, 535 (2001). For the reasons already explained above, the court of appeals' constricted interpretation of "ownership interest" is contrary to the plain and ordinary meaning of these words, as well as the Congressional intent behind the statute, and must therefore be rejected.

There are two additional reasons why the "no superfluous words" canon does not apply here. First, the presence of the word "other" in "other ownership interest" specifically conveys the notion that "shares" are one type of "ownership interest." Thus, the conclusion that an "ownership interest" includes share ownership is implicit in the very grammar of the sentence. In seeking to interpret "ownership interest" narrowly to exclude share ownership so as to give the reference to "shares" independent meaning, the court of appeals twisted the meaning of the statutory language past the breaking point.[16] Second, if, contrary to the argument presented here, the phrase "a majority of whose shares . . . are owned by a foreign state" is limited to

16. The word "other" is used routinely in the way it is used in § 1603(b)(2). For example, Fed. R. Civ. P. 4(h) provides for "service upon a domestic or foreign corporation or upon a partnership or other unincorporated association." The word "other" in this Rule indicates that an "unincorporated association" includes, but is not limited to, a "partnership." Similar uses of the word "other" are legion. *See, e.g.*, Supreme Court Rule 9(1); Fed. R. Civ. P. 4(j)(2), 8(c), 9(b); Fed. R. Cr. P. 4(d)(1).

direct share ownership, the most logical interpretation of "other ownership interest" would be that it encompasses indirect ownership, eliminating any redundancy in the phrase.

II. THE RELEVANT TIME PERIOD FOR DETERMINING WHETHER AN ENTITY IS AN AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE INCLUDES THE TIME OF THE ACTIONS GIVING RISE TO THE CLAIM.

Respondents argued in the district court that, since the FSIA defines "agency or instrumentality of a foreign state" as "any entity . . . a majority of whose shares or other ownership interest *is* owned by a foreign state," 28 U.S.C. § 1603(b)(2) (emphasis added), the relevant time period for determining a party's foreign sovereign status is the date of the filing of the lawsuit. Therefore, claimed Respondents, even if DSB were an agency or instrumentality of the State of Israel at the time of the acts giving rise to the DBCP-related claims asserted against it, DSB lost that status with regard to such claims when Israel became a minority shareholder in 1995, two years before the action was commenced. In rejecting that argument, the district court followed the ruling of every appellate court that has faced this issue and held that it is sufficient if the foreign state had majority ownership at the time of the events giving rise to the suit. Pet. App. 62a-64a. The court of appeals did not reach the issue, but expressed skepticism as to the district court's conclusion. *Id.* 20a-22a. The district court's interpretation of the Act is consistent with its statutory language, the statutory purpose, other laws on immunities, and well established caselaw.

A. A Holding that an Entity Is an Agency or Instrumentality of a Foreign State Based on its Status at the Time of the Alleged Wrongdoing is Consistent With the Statutory Language.

The use of the present tense "is" in the phrase "a majority of whose shares or other ownership interest is owned by a foreign state," 28 U.S.C. § 1603(b)(2), does not establish which point in time an entity's shares or other ownership interest must be owned by the foreign state. *GE Capital Corp. v. Grossman*,

991 F.2d at 1381 ("[t]he use of the word 'is' [in § 1603(b)(2)] could speak to a variety of situations, including the time of the alleged wrongdoing."). For the reasons explained below, it should be sufficient under the Act if an entity met the statutory requirements at the time of its alleged wrongdoing.

The present tense is commonly employed to refer to both the past and future as well as the present time frame. Such an interpretation of the statute here is thus entirely consistent with everyday usage of language and commonly understood principles of grammar:

> [T]he present tense of a verb may sometimes refer to the past and to the future as well as to the present. R. Pence and D. Emery, *A Grammar of Present-Day English* 262-63 (2d ed.). For example, the historical present tense is used in narratives to express past events in the present tense. Furthermore, the present tense may be used when the time is actually indefinite. *Id.*

In re Stratford of Texas, Inc., 635 F.2d 365, 369 (5th Cir. 1981). Courts have frequently recognized such use of the present tense by Congress in its legislative enactments. *See Coalition for Clean Air v. Southern California Edison Co.*, 971 F.2d 219, 225 (9th Cir. 1992) (congressional legislation commonly uses verbs in the present tense to refer to the past, present, or future "all at the same time"), *cert. denied*, 507 U.S. 950 (1993); *Abercrombie v. Clarke*, 920 F.2d 1351, 1359 (7th Cir.) ("it is abundantly clear that Congress intended the present tense language [of the banking statute under review] to apply to past acts"), *cert. denied*, 502 U.S. 809 (1991).

One need look no further than other language in the FSIA to demonstrate that Congress' use of the present tense in that statute cannot be interpreted to refer exclusively to the period that a lawsuit is filed or pending. Section 1605(a)(2) grants a district court subject matter jurisdiction over an agency or instrumentality of a foreign state if the plaintiff's claim is based upon a "commercial activity . . . that *causes* a direct effect in

the United States." 28 U.S.C. § 1605(a)(2) (emphasis added). Although this phrase is in the present tense, like the definitional language in § 1603(b)(2), this Court and others have focused on whether the commercial act caused a direct effect at the time of the act giving rise to the suit, not whether it causes such an effect on the date the suit is commenced. *See Republic of Argentina v. Weltover*, 504 U.S. 607, 611, 618-19 (1992); *Verlinden*, 461 U.S. at 498 n.23; *Hanil Bank v. PT. Bank Negara Indon.*, 148 F.3d 127, 129 (2d Cir. 1998); *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 727 (9th Cir. 1997); *Aldy v. Valmet*, 74 F.3d 72, 75-76 (5th Cir.), *cert. denied*, 519 U.S. 817 (1996).[17]

B. Applying the FSIA to a Suit Stating Allegations Against an Entity that was an Agency or Instrumentality of a Foreign State at the Time of its Alleged Conduct Serves the Statutory Purpose of Protecting Foreign Relations, Channeling Allegations of this Character to Federal Courts, and Providing Immunity in Non-Commercial Cases.

A primary reason Congress chose to provide a broad right of access to federal courts for foreign states, including their

17. Analogous usage is found in the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Under CERCLA a company may be held liable if it "accepted any hazardous substances for transport to disposal . . . facilities . . . from which there *is* a release, or a threatened release which *causes* the incurrence of response costs, of a hazardous substance." 42 U.S.C. § 9607(a)(4) (emphasis added). Although the phrase "from which there is a release" is in the present tense, courts look at releases that have occurred at the CERCLA site in the past, well prior to initiation of CERCLA litigation. *See, e.g., Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 655-56, 658-59 (6th Cir. 2000); *NutraSweet Co. v. X-L Engineering Co.*, 227 F.3d 776, 784-85 (7th Cir. 2000); *New Jersey Turnpike Authority v. PPG Industries, Inc.*, 197 F.3d 96, 103-04 (3d Cir. 1999). Similarly, the term "causes" does not require that the release be causing response costs to be incurred on the date a CERCLA lawsuit is filed to recover past response costs. *See* 42 U.S.C. § 9613(g)(2) (limitations period expires 3 years after completion of removal action).

agencies or instrumentalities, was its recognition that "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States." *Verlinden*, 461 U.S. at 493; *see also* H.R. No. 94-1487 at 32, *reprinted in* U.S.C.C.A.N. at 6631 (citing "the political sensitivity of actions against foreign states" as the rationale for allowing them to remove actions to federal court).

To restrict the application of the FSIA to those cases where the entity whose status is at issue has the requisite relationship with the foreign state at the time suit is commenced would be at odds with the statute's essential purpose of promoting harmonious international relations. Lawsuits based on actions taken while an entity was an agency or instrumentality of a foreign state raise the same types of foreign policy concerns that the FSIA and sovereign immunity in general seek to address. Any lawsuit against a former agency or instrumentality of a foreign state will inevitably be premised on the facts and circumstances that existed at the time the alleged wrongdoing occurred. The fact that the entity is not a foreign state at the time suit is brought does not diminish the foreign policy implications of such a lawsuit or the corresponding comity considerations, as the court will necessarily be called upon to pass judgment on the foreign state's actions at the time the cause of action arose. *See GE Capital Corp. v. Grossman*, 991 F.2d at 1381 (suits against entities formerly owned by a foreign state will likely require a court in this country to "judg[e] the acts of another nation" regarding allegations that it, or its agencies or instrumentalities, committed a legal wrong); *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480-81 (5th Cir. 1998) (the FSIA was designed to promote harmonious international relations and effectuate notions of comity among nations; such concerns do not vanish when a corporate entity is divested of government ownership before an action is commenced), *cert. denied*, 525 U.S. 1141 (1999); *Cargill International S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (the interests sought to be promoted by the statute are implicated even after privatization has begun).

Even the court of appeals below, which expressed some solicitude to Respondents' argument on the timing issue, acknowledged that "[w]here the defendant was a foreign state at the time of the alleged wrong, the complaint perforce alleges that the foreign state did something wrong. By adjudicating that claim, the court may have to pass judgment on the acts or decisions of a foreign sovereign." Pet. App. 21a.[18]

Through passage of the FSIA, Congress sought to promote and preserve harmonious international relations by implementing "'comprehensive rules governing sovereign immunity' [of which] the jurisdictional provisions of the Act are simply one part." *Verlinden*, 461 U.S. at 496 (citation omitted). In particular, the FSIA "represent[s] a comprehensive effort 'to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.'" *Arango v. Guzman Travel Advisors*, 761 F.2d 1527, 1531 (11th Cir.) (quoting H.R. Rep. No. 94-1487 at 6), *cert. denied*, 474 U.S. 995 (1985). The Act accords certain procedural protections to such entities even in commercial cases in which they cannot assert immunity from suit, including a right to federal court jurisdiction and a non-jury trial. 28 U.S.C. §§ 1330(a), 1441(d). Denying foreign state status to an entity that is privatized prior to the filing of a lawsuit but after the alleged acts at issue occurred could result in the actions of a foreign sovereign, taken at the time the cause of action arose, being assessed by a jury in state court. This result would

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18. The Court has cited the same foreign relations concerns as one rationale for the analogous act of state doctrine. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972) ("[J]uridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government.").

undermine the FSIA's goal of "render[ing] uniform in procedure and substance the treatment of foreign sovereigns subjected to suit in American courts." *Nolan v. Boeing Co.*, 919 F.2d 1058, 1065 (5th Cir. 1990), *cert. denied*, 499 U.S. 962 (1991). Accordingly, the statutory purpose of the FSIA requires that federal courts assume jurisdiction under the statute in cases where the actions of an agency or instrumentality are at issue, even if that party is no longer an agency or instrumentality of a foreign state.

C. Considering an Entity's Sovereign Status Under the FSIA at the Time of Its Alleged Wrongdoing Is Consistent with the Rule Applicable to Other Immunities.

The application of the FSIA to entities that were agencies or instrumentalities at the time of their allegedly tortious conduct is also consistent generally with how other immunity doctrines deal with a change in a defendant's status between the time of the allegedly tortious or unlawful acts and the date of the lawsuit. In the context of domestic sovereign immunity, for example, the status at the time of the alleged wrongdoing is generally dispositive.

This Court has previously held that a defendant retains immunity even if government ownership of the defendant is transferred to a private party between the time of the alleged acts and a suit to recover upon such acts. *The Western Maid v. Thompson*, 257 U.S. 419 (1922). This case addressed *in rem* proceedings against vessels for collisions that occurred while the vessels were owned by or under charter to the United States government. In each instance, the United States government had transferred ownership of the vessel to private hands after the alleged wrongdoing but prior to suit. The Court, in an opinion by Justice Oliver Wendell Holmes, held that the sovereign immunity that attached while the vessels were government owned was not lost when the vessels were transferred to private ownership. *Id.* at 432-33.

The same principles may be found in other immunity contexts. A governmental employee who enjoys qualified

immunity for his official acts does not forefeit his immunity merely because he happens to leave his position with the government before a plaintiff initiates a lawsuit. *See, e.g. Mitchell v. Forsythe*, 472 U.S. 511 (1985). Similarly, a federal judge who enjoys absolute immunity from suit based on judicial acts is not suddenly stripped of such immunity upon leaving the bench.

That such immunities are not lost when the status of the protected entity changes before an action is commenced is equally applicable in the context of the FSIA. As in these examples, an agency or instrumentality of a foreign state is cloaked with certain protections attributable to its sovereign status at the time of the alleged actions giving rise to a lawsuit. Where such an entity is alleged to have committed some wrongful act while it had such status, it is free to invoke these protections. Because such protections are rooted in the doctrine of sovereign immunity, there is no basis to deny their applicability to an entity that was an agency or instrumentality of a foreign state when the act occurred but not at the time of suit.

D. Every Appellate Court to Address the Timing Issue Has Held that the FSIA's Definition of a Foreign State Includes an Entity that was an Agency or Instrumentality of a Foreign State at the Time of the Acts Upon Which the Suit is Based.

The district court held that DSB is entitled to FSIA foreign state status if it was an agency or instrumentality of the State of Israel at the time the alleged wrongdoing occurred. Pet. App. 62a-64a. Similarly, in *Delgado*, Judge Lake held that "[s]ince Israel owned a majority of the shares of Dead Sea when plaintiffs were allegedly exposed to DBCP manufactured by Dead Sea, FSIA jurisdiction exists notwithstanding subsequent changes in ownership." *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1340 n.33 (S.D. Tex. 1995), *aff'd*, 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001). The holding of these courts is consistent with well established case law.

Four circuits have expressly held that the status of the defendant as an agency or instrumentality of a foreign state at the time of the alleged wrongdoing is sufficient to create FSIA jurisdiction. *See Pere v. Nuovo Pignone, Inc.*, 150 F.3d at 480-81; *GE Capital Corp. v. Grossman*, 991 F.2d at 1381; *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988); *In re Chase & Sanborn Corp.*, 835 F.2d 1341, 1347-48 (11th Cir. 1988), *rev'd on other grounds sub nom. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *accord Cargill International S.A. v. M/T Pavel Dybenko*, 991 F.2d at 1016 (noting that sensitive foreign relations interests could well remain in any given case even after a company has been privatized).[19]

A number of district courts have also followed *Gould, Grossman* and their progeny. *See, e.g., Daly v. Llanes*, 30 F. Supp.2d 407, 418-19 (S.D.N.Y 1998); *Belgrade v. Sidex International Furniture Corp.*, 2 F.Supp.2d 407, 412-14 (S.D.N.Y. 1998); *Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525, 530 (S.D. Tex. 1994); *Papanos v. Lufthansa German Airlines*, No. 94-2667-CIV, slip op. at 7 (S.D.Fla. 1995); *but see Ocasek v. Flintkote Co.*, 796 F. Supp. 362, 365 (N.D. Ill. 1992).[20]

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19. Two of these decisions even indicated that the importance of the FSIA is diminished in the context of protecting entities that were not government-owned at the time of the underlying events. *See Gould*, 853 F.2d at 450 ("[a]s to completed acts upon which the complaint is based, the parties are bound by the jurisdictional facts existing at the time of those acts"); *Chase & Sanborn*, 835 F.2d at 1347-48 (implying that the only relevant time for assessing the status of an entity claiming to be an agency or instrumentality is the time of the underlying violation).

20. A few courts have held that an entity's status as an agency or instrumentality of a foreign state at the time a lawsuit is filed also qualifies it to assert the protections of the statute. *See Straub v. A.P. Green*, 38 F.3d 448, 451 (9th Cir. 1994); *Rutkowski v. Occidental Chemical Corp.*, 1998 WL 107342, *2 (N.D. Ill. 1988). These cases do not address whether

(Cont'd)

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Dated: August 23, 2002

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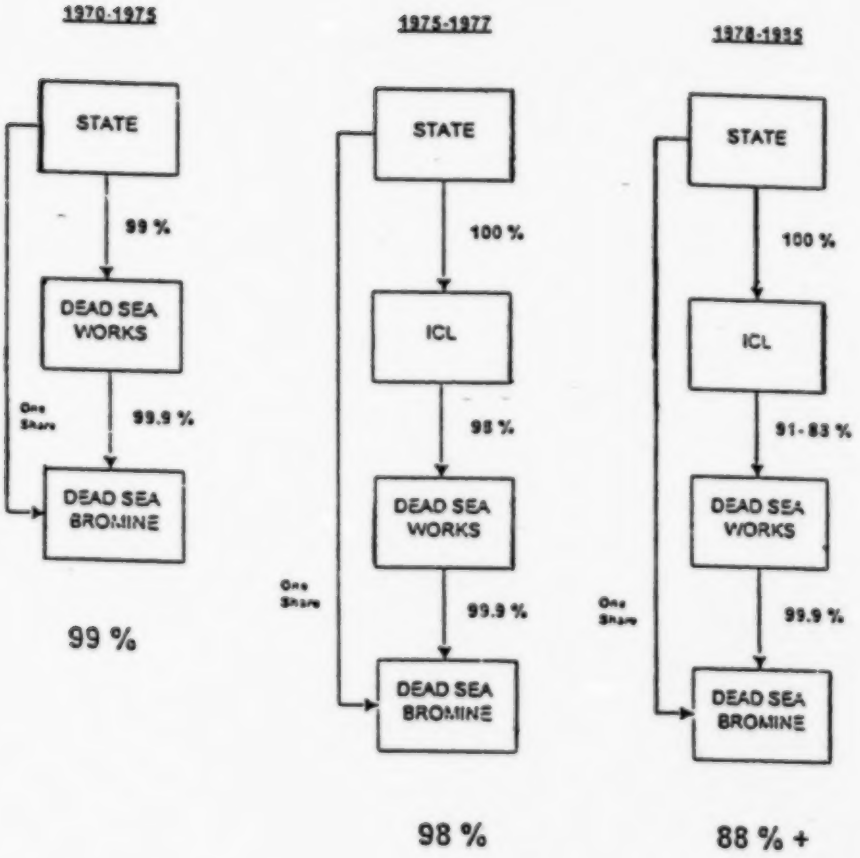
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(Cont'd)
foreign state status at the time the cause of action arose would be sufficient or insufficient under the FSIA. Thus, they do not conflict with the many decisions that have held that agency or instrumentality status at the time of the alleged acts giving rise to liability is sufficient. Rather, these cases support DSB's position that the FSIA applies if a party is a foreign state *either* at the time of the alleged acts giving rise to suit *or* at the time of suit. *See Belgrade*, 2 F.Supp.2d at 413 ("The particular concerns that underlie FSIA jurisdiction are safeguarded under both approaches.").

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ADDENDUM

DEAD SEA BROMINE COMPANY, LTD.
OWNERSHIP CHART



(8) (9)

NOS. 01-593, 01-594

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DOLE FOOD COMPANY, ET AL.,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, ET AL.,

Respondents.

DEAD SEA BROMINE CO., LTD., ET AL.,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a corporation is an "agency or instrumentality" if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation.

2. Whether a corporation is an "agency or instrumentality" if a foreign state owned a majority of the shares of the corporation at the time of the events giving rise to litigation, but the foreign state does not own a majority of those shares at the time that a plaintiff commences a suit against the corporation.

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BRIEF OF RESPONDENTS

This case presents two questions concerning the scope of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11:

1. Whether a corporation qualifies as an "agency or instrumentality," for purposes of FSIA Section 1603(b)(2), if a foreign state does not own any shares of the corporation in question but instead owns a majority of the shares of a parent company that in turn owns a majority of the shares of the corporation.

2. Whether a corporation qualifies as an "agency or instrumentality" if a foreign state owned a majority of the shares of the corporation at the time of the events giving rise to litigation, but not at the time that a plaintiff commenced suit against the corporation.

In this case, the Ninth Circuit, per Kozinski, J., properly held that the FSIA's ownership test applies only to the first tier of direct corporate ownership by a foreign state. The Ninth Circuit did not decide the second question presented, although it opined that there is "a plausible basis for concluding that the FSIA does not come into play where a suit is brought against a private entity that was a foreign state at the time of the alleged wrongdoing, but is no longer." Pet. App. 21a.[1] The Ninth Circuit was correct. The proper construction of the FSIA indicates that a corporation is not covered by the FSIA if the foreign state does not own a majority of shares at the time the plaintiff commences suit.

STATEMENT

1. The Dead Sea Companies

This case presents a particularly attenuated claim to the protections of the FSIA. Petitioners Dead Sea Bromine Co., Ltd.

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[1] Unless otherwise indicated, citations are to the appendix in No. 01-594, *Dead Sea Bromine Co. v. Patrickson.*

("Dead Sea Bromine") and Bromine Compounds Limited ("BCL") (together, the "Dead Sea Companies") were never owned directly by the Israeli government. Pet. App. 22a. Rather, "at all relevant times, the chain of ownership included intermediary corporations." *Id.* at 65a. Between 1968 and 1995, the Companies were second-tier, third-tier, or fourth-tier members of a corporate chain whose top parent company was government-owned. *Id.* For example, from 1970 to 1975, the State of Israel owned 99% of an entity named Dead Sea Works which in turn owned 99.9% of Dead Sea Bromine. *Id.* Dead Sea Bromine owned 50% of BCL, and Dead Sea Works owned 25% of BCL. *Id.* After 1975, another entity was added to the chain of ownership when the State of Israel conveyed its ownership of Dead Sea Works to Israel Chemicals, Ltd., an Israeli corporation owned by the State of Israel.

The Ninth Circuit found that "[a]ny ownership interest of Dead Sea and BCL claimed by the State of Israel was completely indirect at all relevant times." *Id.* Indeed, petitioners no longer focus on the State of Israel's alleged "ownership" interest in BCL as a means of satisfying Section 1603(b)(2) of the FSIA. Dead Sea Br. 7 n.4.

Moreover, any interest by the State of Israel has diminished over time. In the early 1990s, the Dead Sea Companies were privatized. Pet. App. 62a. Petitioners concede that – even under their calculations of indirect ownership – since 1995 the State of Israel "no longer holds a majority ownership interest in [Dead Sea Bromine]." Dead Sea Br. 7.

The Dead Sea Companies are commercial mining enterprises whose operations are far removed from the core concerns of the FSIA. An expert on Israeli law testified in the district court that Dead Sea Bromine "is not in any way an arm or an organ of the State, nor is it a government department or authority. Bromine is a commercial company for all intents and purposes." JA 223. "The Company is a separate legal entity which can sue or be

sued by the State." JA 227. "The Company is obliged to act in accordance with ordinary commercial considerations." *Id.*

The expert concluded that Dead Sea Bromine is an ordinary corporation which is in fact required by Israeli law to act "on an ordinary business basis." JA 224. "A government company is not an organ of the State, it is a separate and distinguished legal entity. Pursuant to Israeli law, it is managed in accordance with commercial considerations, it does not enjoy the immunities which the State enjoys and it is not subject to the duties and restrictions that apply to the Government." *Id.* "[I]t is a business company, just as every ordinary commercial company, private or public." JA 225. "[T]he Government is not entitled to dictate to Bromine other considerations for acting, and the Company is obliged to act in accordance with business considerations, just as any other commercial company." JA 225. If the directors act in the interests of the government rather than those of the company, they breach their duties of trust and may be sued. JA 226. A director "may not accept instructions from the Government as to the manner in which he votes." *Id.* "The Company is not an instrument or tool to be used by the State to attain any object whatsoever, it is not an agency or an instrument of the State and is not subordinate thereto." JA 227.

According to the testimony of Mr. Noah Ehrlich, a Dead Sea Bromine and BCL vice-president:

- Dead Sea was considered by the Israeli Government Companies Authority to be a commercial "profit-oriented company." JA 263.

- The Dead Sea Companies are motivated by a desire to increase their worldwide market share in developing new products to give them "a marketing and economic advantage." JA 233.

- Dead Sea employees are not employees of the state of Israel and are not paid by the state. JA 268.

• The Dead Sea Companies were obligated by law to act in accordance with "the business considerations by which a non-Government company is normally guided." JA 258.

• The Dead Sea Companies do not claim immunity in domestic lawsuits in Israel. JA 261.

• The Dead Sea Companies, not the government, are responsible for satisfying any judgment from their own assets. JA 261.

• The Dead Sea Companies have the ability to sue the government of Israel. JA 267-68.

• The government does not determine the day-to-day responsibilities or conduct of any Dead Sea employees. JA 268-69.

• The Companies engaged in day-to-day business activities, devised specific customer service programs, determined their product lines and product mix, purchased real estate, and increased production capacity, all without governmental approval. JA 234-35, 240, 252, 267.

• The government had no input in determining the price of the Companies' products. JA 252.

• The Dead Sea Companies applied for government R&D grants, which the government sometimes rejected. JA 239. Such grants were also given to non-government companies. JA 251.

• The Dead Sea Companies made their own decisions as to business insurance and routinely purchased it on the private market. JA 245.

• Dead Sea Bromine's human resource department set base salaries, JA 248, and its corporate parent provided "a specific wage discussion" as to wage increases and bonuses, after the Government Companies Authority decided "a wage

negotiation by . . . sector." JA 247.

• The government of Israel permitted the Dead Sea Companies to keep profits outside the country "for a long period of time" for the purpose of reinvesting in the business. JA 245.

• Dead Sea Bromine's vice president presented the company's annual budget to its corporate parent, Israel Chemicals Ltd., for approval. JA 249.

• The government never disapproved the companies' selection of legal advisers. JA 262-63.

Mr. Ehrlich also revealed that the Dead Sea Companies make their litigation decisions, including waiving of "sovereign" immunity, without consulting with, or even informing, the government. JA 255-57. The companies have hired lawyers, removed cases from state court, settled cases with plaintiffs, entered into contribution and indemnity agreements with third parties, and even waived sovereign immunity claims completely – all without advising, let alone securing the approval of, the Israeli government. *Id.*

2. The Instant Litigation

On October 3, 1997, plaintiffs commenced this action by filing a complaint in the Circuit Court of the First Circuit of the State of Hawaii. Pet. App. 57a. Plaintiffs are nine foreign residents injured while working on banana plantations in Latin America by a dangerous chemical that has been banned in the U.S. but that the Dole Defendants[2] have continued to export and use abroad. *Id.* at 4a. Plaintiffs were regularly exposed, without their knowledge and without proper protective equipment, to dibromochloropropane (DBCP), a pesticide that causes male

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[2] The "Dole Defendants" includes the petitioners in No. 01-593. It does not include the petitioners in No. 01-594.

sterility, testicular atrophy, testicular and other cancers, miscarriages in women, mutation of sperm cells in men, damage to the liver and kidneys, and injury to retinal and corneal tissue. The National Cancer Institute (NCI) has described it as "one of the most potent known carcinogens." As early as 1958, an in-house toxicology report at Dow Chemical Co. concluded that DBCP was "readily absorbed through the skin and high in toxicity in inhalation." Dow's data also showed that "liver, lung and kidney effects might be expected" and that "testicular atrophy may result from prolonged, repeated exposure."

The Dole Defendants claim to have had business relationships with the Dead Sea Companies and have asserted a third-party claim against them. JA 11. Yet the Dead Sea Companies have never provided any evidence of when or where their DBCP was used (if ever), nor have they shown that any plaintiff was exposed to their DBCP. In fact, the Dead Sea Companies have denied causing harm to any of the plaintiffs. JA 56-65.

On October 31, 1997, the Dead Sea Companies filed their Petition for Removal. This Petition was allegedly premised on a third-party complaint filed two hours earlier on the same day by the Dole Defendants against the Dead Sea Companies. Pet. App. 58a. The removal petition was filed despite clear and unambiguous disclaimers in plaintiffs' complaint specifically denying claims for exposure to DBCP made by the Dead Sea Companies. JA 24, 39-40.

3. The District Court's Decision

The district court denied the Dead Sea Companies' assertion of FSIA jurisdiction. In a memorandum opinion and order dated September 9, 1998, the court held that the Dead Sea Companies were not agencies or instrumentalities of Israel.

The court began by accepting petitioners' view that the proper time for ascertaining FSIA foreign state status is the time the

alleged wrongdoing occurred. Pet. App. 62a-64a. But the court concluded that "Israel's indirect ownership of Dead Sea and BCL through several intermediary corporations does not qualify Dead Sea and BCL as agencies or instrumentalities of a foreign state pursuant to 28 U.S.C. § 1603(b)(2). Dead Sea and BCL are not entities whose majority of shares or other ownership interest are owned by a foreign state." *Id.* at 71a (following *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.), *cert. denied*, 516 U.S. 869 (1995), and *Corporacion Mexicana de Servicios Maritimos S.A. de C.V. v. M/T Respect*, 89 F.3d 650 (9th Cir. 1996)).

The district court also held that the Dead Sea Companies could not qualify as "organs" of a foreign state for purposes of Section 1603(b)(2). The court found that "Dead Sea and BCL are commercial mining operations concerned with production, marketing, and profit." Pet. App. 78a. They are "not treated as agencies under Israeli law." *Id.* "[T]he government's control is not derived from the need to play an active supervisory role over a government created entity." *Id.* The Dead Sea Companies "were not created by the government to fulfill a government mission." *Id.* at 79a. Moreover, the district court noted that "the entities are not staffed solely with government employees." *Id.* at 78a.

Accordingly, the district court held that the Dead Sea Companies could not qualify as "agencies or instrumentalities" or "organs" under the FSIA and that removal under the FSIA was improper. Because it reached this conclusion, the district court had no occasion to reach plaintiffs' alternative argument that the Dead Sea Companies had been fraudulently joined. Pet. App. 79a n.5.

4. The Court of Appeals' Decision

The Court of Appeals affirmed the district court's holding with respect to the Dead Sea Companies, in a unanimous opinion authored by Judge Kozinski. The Ninth Circuit held that "the Dead Sea Companies were never owned directly by the Israeli

government" and therefore could not "claim to be instrumentalities through stock ownership." Pet. App. 22a. "[A] corporation wholly owned by an instrumentality of a foreign government is not a foreign instrumentality under the FSIA." *Id.*

The Ninth Circuit also held that the Dead Sea Companies were not "organs" of the Israeli government under Section 1603(b)(3). The court found that "the Dead Sea Companies were not run by government appointees; their employees were not treated as civil servants; nor were the Companies wholly owned by the government of Israel." *Id.* at 25a-26a. "The Companies could sue and be sued, and could in fact sue the government of Israel (although official Israeli documents describe such disputes as between 'a government company and another government body')." *Id.* at 26a. "These factors support the district court's view of the Companies as independent commercial enterprises, heavily regulated, but acting to maximize profits rather than pursue public objectives." *Id.*

SUMMARY OF ARGUMENT

In no other country in the world would the Dead Sea Companies be accorded the sovereign immunity they seek in this Court. Not even the courts of Israel, their home country, would treat them as immune from suit. Yet the Companies contend that Congress has bestowed such immunity on them, despite the fact that one of Congress' central purposes in enacting the Foreign Sovereign Immunities Act was to align U.S. law with international practice.

I. The statutory text and structure demonstrate that a corporation is not covered by the FSIA if a foreign state owns a majority of the shares of the parent company rather than a majority of the shares of the corporation itself. Section 1603(b)(2) should be interpreted against the fundamental corporate law principle that "[a] corporation and its stockholders are generally to be treated as separate entities." *Burnet v. Clark*, 287 U.S. 410, 415 (1932). When ownership of a subsidiary

corporation is tiered through an intermediate corporation, legal ownership of the subsidiary resides in the intermediate corporation that possesses the subsidiary's shares of stock. Many federal statutes refer to "control," "indirect" or beneficial forms of ownership, or other broad means of corporate affiliation. The FSIA does not. Because Congress used the phrase "owned by," rather than other statutory language, it is clear that Congress intended to require direct ownership by a foreign state.

Petitioners' alternate argument that the State of Israel held an ill-defined "other ownership interest" in the Dead Sea Companies is flawed. Section 1603(b)(2) does not refer in the abstract to "majority ownership interests." Rather, it refers to "shares or other ownership interest." The Ninth Circuit properly concluded that the reference to "other ownership interest" should not be interpreted "in such a way as to make the majority-shareholder requirement superfluous" but instead should be construed "simply to describe some other form of ownership not called shares of stock." Pet. App. 23a.

Petitioners' approach would frustrate the purposes of the FSIA. It would move the FSIA further away from its avowed purpose of making United States law consistent with international practice. It would also deprive U.S. citizens of means of legal redress against foreign entities by dramatically expanding the number of corporations which could qualify for the benefits of the FSIA. Petitioners' approach would create traps for even the most wary plaintiffs, since even many sophisticated litigants will be unaware that a foreign corporation's chain of ownership includes a foreign state or political subdivision at the top. The FSIA imposes many procedural burdens on U.S. plaintiffs, including loss of jury trial rights, strict tests for personal jurisdiction, special service rules, and limitations on execution of judgments. Extending these procedural rules to a host of tiered corporate entities, as petitioners seek, would run directly contrary to a central purpose of the FSIA.

There is no reason to stretch the statute to protect the interests of foreign states. If a foreign entity (whether corporate or not) is genuinely involved in sovereign activities, it can seek to satisfy a separate test for FSIA immunity, known as the "organ" test. Here, the lower courts held that the Dead Sea Companies did not meet that test, and petitioners do not seek review of the question.

II. A corporation is not covered by the FSIA if the foreign state does not own a majority of shares at the time the plaintiff commences suit. Congress used the present tense in drafting the statute. It included special rules for service of process and enforcement of judgments which plainly contemplate that the entity in question would actually qualify as a foreign state or an agency or instrumentality at the time of suit. The purposes of the statute point to the same interpretation.

The court of appeals' judgment should be affirmed.

ARGUMENT

I. A CORPORATION IS NOT COVERED BY THE FSIA IF A FOREIGN STATE OWNS A MAJORITY OF THE SHARES OF THE CORPORATE ENTERPRISE THAT IN TURN OWNS A MAJORITY OF THE SHARES OF THE CORPORATION.

A. The Text and Structure of the FSIA

The text and structure of the FSIA are dispositive in this case. The definition of "foreign state" in the FSIA includes "agencies or instrumentalities" of the foreign state. 28 U.S.C. § 1603(a). An "agency or instrumentality" is defined as an entity:

> (1) "which is a separate legal person, corporate or otherwise,"
>
> (2) "which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," and

(3) "which is neither a citizen of a State of the United States . . . nor created under the laws of any third country."

28 U.S.C. § 1603(b)(1)-(3).

The FSIA thus draws clear distinctions among foreign states, political subdivisions of foreign states, and agencies or instrumentalities of foreign states and political subdivisions thereof. As written, the Act provides potential immunity to entities that either (a) are organs of a foreign state or political subdivision thereof or (b) have a majority of shares owned by the foreign state or political subdivision. It does not extend immunity to entities that are owned by an agency or instrumentality of a foreign state. The *only* shares of a corporation that count toward the majority-ownership requirement of Section 1603(b)(2) are those shares held by the foreign state itself or by its political subdivisions. Shares of a corporation that are owned *not* by "a foreign state or political subdivision thereof," but instead by *another corporation* (which is the case here), do not count – even if the parent corporation happens to be an instrumentality of a foreign state or political division thereof because a majority of *its own shares* are owned by that foreign state or political subdivision.

The plain language of Section 1603(b)(2) requires this result because it fails to list as relevant shares that are held merely by *agencies or instrumentalities* of foreign states. Hence, in order to qualify under the FSIA, a corporation must have a majority of its shares owned by a foreign state or political subdivision – not by another instrumentality. The House Report reflects this understanding. It provides that "a majority of the entity's shares or other ownership interest [must] be owned by a foreign state (or by a foreign state's political subdivision)." H.R. Rep. No. 94-1487, at 15 (1976), reprinted in 1976 U.S.C.C.A.N. 6614.

Several features of the statutory structure fortify this

conclusion. First, Section 1603(a) provides that a foreign state "*includes*" an agency or instrumentality, not that an agency or instrumentality *is* a foreign state, or that an agency or instrumentality *is defined as* a foreign state. Section 1603(a)'s "includes" language does not authorize the conclusion that a corporation that happens to be an instrumentality of a foreign state actually *is* a foreign state, so as to permit infinite "tiering" under Section 1603(b)(2). *See In re Ski Train Fire in Kaprun, Aus.*, 198 F. Supp. 2d 420, 425 (S.D.N.Y. 2002) ("While section 1603(a) provides that the term foreign state 'includes' political subdivisions, agencies and instrumentalities, it does not 'equate' foreign state with agency or instrumentality. It is a subtle distinction, but also the only explanation that can be squared with the remainder of section 1603.").

Second, the meaning of the term "foreign state" in Section 1603(b)(2) is necessarily quite narrow because, by definition, it can only mean an entity that is *capable* of having "a political subdivision thereof." If the term "foreign state" in Section 1603(b)(2) were construed as meaning, from the very beginning, everything listed in Section 1603(a), then political subdivisions would already be encompassed in the term and the reference to political subdivisions in Section 1603(b)(2) would become superfluous, in violation of well-accepted principles of statutory construction. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001) ("'Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'") (quoting *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990)); *see also Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1285 n.12 (3d Cir. 1993); *In re Ski Train Fire*, 198 F. Supp. 2d. at 425.

Third, in the FSIA Congress drew careful distinctions among foreign states, political subdivisions, and agencies or instrumentalities of foreign states and political subdivisions.

Tellingly, Section 1603 is a definition section, in which each term is separately explained for correct use in subsequent parts of the statute. If Congress had intended that an agency or instrumentality could be majority owned by another agency or instrumentality, it clearly could have stated so in its definition of agency or instrumentality. If it had wished to adopt petitioners' view of the statute, Congress could have referred in Section 1603(b)(2) to the shares held by "a foreign state or political subdivision thereof, or *an agency or instrumentality thereof*." Indeed, Congress used the italicized language in 28 U.S.C. § 1606. Instead, Congress focused solely on the shares owned by "a foreign state or political subdivision thereof" – the same phrase that Congress employed in another provision of the Act to single out *only a foreign state itself and its political subdivisions*, and to exclude a foreign state's agencies or instrumentalities. *See* 28 U.S.C. § 1391(f)(4); *see also* 28 U.S.C. § 1608(a) (using similar reference to "foreign state or political subdivision of a foreign state").

The differential treatment of the three types of foreign entities defined under the FSIA is hardly unique to Section 1603(b)(2). In at least four sections of the Act besides Section 1603(b), Congress decided to single out for special treatment the "foreign state" itself, often along with its "political subdivision," in the process making clear that "agencies or instrumentalities of a foreign state" constitute a *different* sort of entity, one that is generally afforded less favorable treatment.[3] Thus, in each of the four places in which Congress used the phrase "foreign state or political subdivision thereof," it meant to exclude "agencies or instrumentalities."

The statutory text and structure thus foreclose petitioners'

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[3] Specifically: the venue provisions, 28 U.S.C. § 1391(f)(3); liability for punitive damages, § 1606; property located in the United States that is subject to attachment in aid of execution, § 1610; and service of process, § 1608.

theory of "tiered" ownership.

B. The State Did Not "Own" a Majority of Shares in the Dead Sea Companies

1. Petitioners argue that, in "ordinary speech," a majority shareholder is said to "own" the assets or subsidiaries of a corporation. Dole Br. 16. They urge that "the corporate form can be ignored" in this case (*id.* at 35) and chide the Solicitor General for advancing a "technical" interpretation of the statute. *Id.* at 33. But corporate law conceptions *are* technical. Colloquialisms and newspaper reports (Dole Br. 17 n.5) are not the proper bases for statutory interpretation in this area. The starting premise of corporate law, in fact, is that formalities matter.[4] Indeed, it is somewhat surprising that petitioners – which are themselves business corporations – should be so eager to have this Court disregard the "technicalities" of corporate ownership. If the context were different – if this were case in which a plaintiff sought to pierce the corporate veil, for example – petitioners' eagerness to disregard those formalities might well disappear.

When ownership of a subsidiary corporation is tiered through an intermediate corporation, legal ownership of the subsidiary resides in the intermediate corporation that holds the subsidiary's shares of stock.[5] Because Congress used the phrase "owned by," rather "indirectly owned by," "beneficially owned by," "controlled by," or even "attributable to," it is clear that Congress intended to require direct ownership by a foreign state.

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[4] *See* Calvert Magruder, *A Note on Partnership Liability of Stockholders in Defective Corporations*, 40 HARV. L. REV. 733, 742 (1927) ("The attribution of rights and obligations to a group as a unified juristic person is no doubt only a bit of legal technique. But technique is not to be despised. . . .").

[5] Philip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295, 299 (1996).

Congress knows how to write broadly when it wishes to. Many other statutes refer sweepingly to direct or indirect ownership or control, beneficial interests, and other forms of corporate relationships.[6] The statutory examples cited by petitioners prove

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[6] *E.g.*, 5 U.S.C. § 8477(a)(4)(G)(ii) (holders of 50% "beneficial interest" in corporation); 5 U.S.C. § 8477(a)(4)(G)(iii) ("owned directly or indirectly"); 5 U.S.C. § 8902a(c)(3) ("Any individual who directly or indirectly owns or has a control interest in" entity); 7 U.S.C. § 1a(8) ("owned or controlled, directly or indirectly"); 7 U.S.C. § 2 ("owned or controlled, directly or indirectly"); 7 U.S.C. § 1308-3a(d) ("direct and indirect ownership interest"); 7 U.S.C. § 1635i(1)(A) ("a person that directly or indirectly owns, controls, or holds with power to vote, 5 percent or more of the outstanding voting securities"); 10 U.S.C. § 2327(b)(1) ("a foreign government owns or controls (whether directly or indirectly) a significant interest in such firm or subsidiary (or, in the case of a subsidiary, in the firm that owns the subsidiary)"); 11 U.S.C. § 101(2)(b) ("corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor"); 12 U.S.C. § 84(c)(5) ("any corporation wholly owned directly or indirectly by the United States"); 12 U.S.C. § 215c(d) ("to acquire, directly or indirectly, ownership or control"); 12 U.S.C. § 221a(b)(1), (2) (corporation "of which a member bank, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares" or "of which control is held, directly or indirectly, through stock ownership or in any other manner"); 12 U.S.C. § 371c(b)(3) ("company or shareholder, directly or indirectly, or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of" stock); 12 U.S.C. § 1468(b)(2) ("any person who directly or indirectly owns, controls, or has the power to vote more than 10 percent of" stock); 12 U.S.C. § 1813(w)(4) ("The term 'subsidiary' (A) means any company which is owned or controlled directly or indirectly by another company"); 12 U.S.C. § 1828 ("hold, directly or indirectly, stock or other evidences of ownership"); 12 U.S.C. § 1841(g)(1) ("For the purposes of this Act, shares owned or controlled by any subsidiary of a bank holding company shall be deemed to be indirectly owned or controlled by such bank holding company"); 12 U.S.C. § 2602(7) ("a direct or beneficial ownership interest"); 12 U.S.C. § 3500.15(c)(4)(ii) ("Directly or indirectly or acting in concert with others, or through one or more subsidiaries, owns, holds with power to vote, or holds proxies representing"); 15 U.S.C. § 78p(a)(1) ("Every person who is directly or indirectly the beneficial owner"); 15 U.S.C. § 79b(8)(A) ("voting securities . . . which are directly or indirectly owned, controlled, or held with

the same point. *See* Dole Br. 36-37 n.16.[7] The FSIA is different from these statutes. Petitioners' interpretation of Section 1603(b)(2) would disregard its distinctive text.

Section 1603(b)(2) should be construed against the basic corporate law principle that "[a] corporation and its stockholders are generally to be treated as separate entities." *Burnet v. Clark*, 287 U.S. 410, 415 (1932); *see also Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (Marshall, C.J.). Congress is presumed to legislate against this "bedrock" and "venerable" principle. *United States v. Bestfoods*, 524 U.S. 51, 62 (1998). Under this rule, a foreign state does not itself own a majority of shares in a subsidiary corporation merely because the foreign state owns a majority of the shares of the parent. Rather, it is the parent company that owns the shares of stock in the subsidiary. The foreign state may own stock of the parent, but it does not "own" the parent's assets. A shareholder has only an indirect interest in the assets of the corporation, which interest is manifested in the right to share in profits through dividends and in the distribution of corporate assets on liquidation. "The corporation holds property, enters into

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power to vote"); 18 U.S.C. § 1802(3) ("The term 'newspaper owner' means any person who owns or controls directly, or indirectly through separate or subsidiary corporations"); 22 U.S.C. § 1642e(c) ("indirect ownership interest in a corporation"); 22 U.S.C. § 5605(b)(2)(F) ("any foreign air carrier owned or controlled, directly or indirectly, by that government"); 30 U.S.C. § 184(h)(1) ("owned, or controlled, directly or indirectly, by means of stock or otherwise"); 47 U.S.C. § 153(1) (Communications Act definition of "own" as including equity interest of 10% of more, and of "affiliate" as including anyone who "(directly or indirectly) owns or controls, is owned or controlled by, or is under common control with"); 47 U.S.C. § 702(7) ("corporation, or other entity which owns or controls, directly or indirectly").

[7] SEC rules regarding consolidated financial statements (Dead Sea Br. 23 n.8) are not based on the same principle as Section 1603(b)(2). Instead, "[t]here is a presumption that consolidated statements are more meaningful . . . when one entity directly or indirectly has a controlling financial interest in another entity." 17 C.F.R. § 210.3A-02(a).

contracts, executes conveyances, and conducts litigation in a legal capacity separate and distinct from its shareholders." James D. Cox and Thomas Lee Hazen, CORPORATIONS § 1.2 (2001).

Even in the immunity context, this Court has adhered to the fundamental principle that a corporation has a legal personality distinct from its shareholders. In *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824), for example, the State of Georgia was an incorporator and part shareholder of the Planters' Bank of Georgia. The bank challenged the court's jurisdiction on sovereign immunity grounds. Chief Justice Marshall, writing for the Court, rejected the plea, reasoning that the bank was a distinct legal entity:

> A suit against the Planters' Bank of Georgia, is no more a suit against the State of Georgia, than against any other individual corporator. . . .
>
> . . . As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act. . . .
>
> . . . We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the federal Courts, by the circumstance that the State is a corporator.

Id. at 906-08. Five years later, the Court again rejected the Eleventh Amendment immunity objection, stating categorically: "this court is of the opinion that the question is no longer open here." *Bank of Ky. v. Wister*, 27 U.S. (2 Pet.) 318, 323 (1829). Further, "a state, when it becomes a stockholder in a bank, imparts none of its attributes of sovereignty to the institution; this is equally the case, whether it own a whole or a part of the stock of the bank." *Briscoe v. Bank of Ky.*, 36 U.S. (11 Pet.) 257, 325-26 (1837). This principle has served as a bright-line

test distinguishing corporate bodies from the state and federal governments for purposes of Eleventh Amendment immunity,[8] state sovereign immunity,[9] and federal sovereign immunity.[10]

There is no reason to depart from this long-settled rule in construing the FSIA. To the contrary, this Court has recognized, in addressing tiered corporate structures created by foreign governments, that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983). "Separate legal personality has been described as 'an almost indispensable aspect of the public corporation.'" *Id.* 625 (citation omitted). In fact, this Court explained that "[w]e find

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[8] *See Wister*, 27 U.S. (2 Pet.) at 323 (defendant bank wholly owned by state held separate entity and not immune); *Metropolitan Sav. Bank & Trust Co. v. Farmers' State Bank*, 20 F.2d 775, 780 (8th Cir. 1927) (federal jurisdiction existed over bank temporarily under state control and supervision); *Murray v. Wilson Distilling Co.*, 164 F. 1, 20-21 (4th Cir. 1908) (state liquor dispensary commission held separate legal entity and not immune).

[9] *See Georgia v. City of Chattanooga*, 264 U.S. 472, 479-80 (1924) (State of Georgia not immune from eminent domain action in state courts of Tennessee to condemn property Georgia owned and leased to private railroad corporation); *North Dakota v. Olson*, 33 F.2d 848, 851 (8th Cir. 1929) (state bank held separate legal entity not immune from federal taxation).

[10] *See Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 389. 394 (1939) (regional agricultural credit corporation created under authority of federal Reconstruction Finance Corporation not immune despite absence of express "sue-and-be-sued" clause in charter); *see also Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549, 565-67 (1922) (U.S. Fleet Corporation not immune despite 100% federal ownership of stock); *United States v. Strang*, 254 U.S. 491, 493 (1921) (same); *Dollar v. Land*, 154 F.2d 307, 312 (D.C. Cir. 1946) (U.S. Maritime Commission); *Ingersoll-Rand Co. v. United States Fleet Corp.*, 195 A.D. 838, 843, 187 N.Y.S. 695, 698-99 (N.Y. App. Div. 1921) (Fleet Corporation not immune in state court); *Gill v. Reese*, 53 Ohio App. 134, 139, 4 N.E.2d 273, 275 (Ct. App. 1936) (federal Home Owners Loan Corporation subject to state court garnishment proceedings).

support for this conclusion in the legislative history of the Foreign Sovereign Immunities Act." *Id.* at 627. "During its deliberations, Congress clearly expressed its intention that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." *Id.* This Court quoted the FSIA House Report, which stated:

> If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another.

Id. at 628 (quoting H.R. Rep. No. 94-1487, at 29-30, 1976 U.S. C.C.A.N. 6628-6629 (citation omitted)).

2. Petitioner cite a number of cases in which this Court has pierced the corporate veil. Dole Br. 19-20, 35; Dead Sea Br. 21-23. For example, petitioners rely on *Bangor Punta Operations, Inc. v. Bangor & Aroostoock R.R.*, 417 U.S. 703 (1974), where this Court opined that "[a]lthough a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy." *Id.* at 713. Petitioners also rely on *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), which applied *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), to uphold a Treasury regulation permitting the importation of certain "gray market" goods whose trademarks are owned by a U.S. subsidiary controlled by a foreign corporation, under a statutory scheme restricting imports of trademarked products whose trademark is "owned by" a United States company. *See id.* at 298 (Brennan, J., concurring in part and dissenting in part) ("it cannot be confidently discerned either which entity owns the trademark or whether the goods in question are 'of foreign

manufacture'").[11]

None of these cases stands for the proposition that corporate separateness is meaningless or may be disregarded on a routine basis. In fact, the cases show the opposite. *See Bestfoods*, 524 U.S. at 62 (affirming principle of corporate separateness but explaining that there are exceptional occasions when the principle will be "qualified or denied") (internal quotation marks and citation omitted); 1 Fletcher, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 31, at 518 (rev. perm. ed. 1999) ("Under certain circumstances, to work justice, the corporate entity and ownership may be disregarded and the shareholder or shareholders regarded as owners; but this concedes the general rules to be just as stated.").

C. The State Did Not Hold an "Other Ownership Interest" in the Dead Sea Companies

1. Petitioners alternatively contend that the Dead Sea Companies qualify under Section 1603(b)(2) "because Israel had a 'majority . . . ownership interest' in them by virtue of being the majority shareholder in the ultimate parent." Dole Br. 21; *see also* Dead Sea Br. 25 (using same ellipsis). Petitioners'

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[11] Petitioners rely on *Flink v. Paladini*, 279 U.S. 59 (1929) (Dead Sea Br. 23; Dole Br. 16, 33), while omitting Justice Holmes' caveat that a court should not "ignore the distinction between a corporation and its members." *Id.* at 63. Petitioners also invoke *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (Dead Sea Br. 23), which held but that a parent and a wholly owned subsidiary cannot engage in a "conspiracy" within the meaning of § 1 of the Sherman Act, 15 U.S.C. § 1, not because they are a single corporate entity but because they "always have a 'unity of purpose or a common design'" for purposes of antitrust law. *Id.* at 771 (citation omitted). And petitioners cite *Franchise Tax Board of California v. Alcan Aluminium Ltd.*, 493 U.S. 331 (1990) (Dead Sea Br. 22), which arose in the tax context and involved issues of corporate *control* rather than ownership. *See id.* at 339 ("We therefore construe the Tax Injunction Act as barring a federal action by a party who has under its direction and control an entity possessing a plain, speedy, and efficient remedy for the controlling party's claims.").

argument is wrong, and their use of an ellipsis is telling.

Section 1603(b)(2) does not refer in the abstract to "majority ownership interests." Rather, it refers to "shares or other ownership interest." The Ninth Circuit properly concluded that the reference to "other ownership interest" should not be interpreted "in such a way as to make the majority-shareholder requirement superfluous" but instead should be construed "simply to describe some other form of ownership not called shares of stock." Pet. App. 23a. Given the foreign legal regimes with which Congress was dealing in the context of the FSIA, it was perfectly understandable for the legislature to make provisions for kinds of equity-like ownership rights that were not explicitly denominated as shares of stock. Petitioners' amici themselves stress "the vast array of forms of ownership that the hundreds of different foreign governments with widely disparate legal systems could potentially use." Br. of Republic of Ireland 15-16. Congress was simply trying to reach stock and its functional equivalents. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (*ejusdem generis*).[12]

The State of Israel did not hold a majority shareholding position in the Dead Sea Companies. Nor did it hold a form of inchoate "property" in the Dead Sea Companies that could be described as an "ownership interest." All the State owned was stock in the Dead Sea Works (until 1975) and Israeli Chemicals Ltd. (after 1975), as well as a single share of Dead Sea Bromine. The nature of Israel's ownership interest is fully captured in the

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[12] Congress elaborated on the majority requirement, explaining that where "entities are entirely owned by a foreign state, they would of course be included within the definition." H.R. Rep. No. 94-1487, at 15, reprinted in 1976 U.S.C.C.A.N. 6614. However, "where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision." *Id.*

statutory term "shares," and that ownership interest never qualified as a majority shareholding interest for purposes of Section 1603(b)(2).

Petitioners would interpret the phrase "other ownership interest" to swallow up the reference to "shares" in Section 1603(b)(2). According to petitioners, the concept of an "interest" is "a comprehensive term" that includes "any right, claim, or privilege that an individual has toward real or personal property." Dole Br. 21 (internal citation omitted). "While it did not directly hold title to DSB's shares, the State of Israel clearly had an interest in the Company that allowed the State to accrue an advantage from its success and control its management and affairs." Dead Sea Br. 26. Such a broad reading of "other ownership interest" – far from supplementing the reference to "shares" – would negate that reference altogether. Moreover, petitioners never identify any conceivable "interest" besides *stock* that the state of Israel held in this case. Nor do they explain how a "majority" interest could be calculated on the basis of whatever fuzzy "right, claim, or privilege" the State of Israel might be deemed to hold in Dead Sea Bromine. Congress could have written Section 1603(b)(2) differently to capture all forms of direct and indirect ownership and control. It did not.

The Dole petitioners would apparently transform the *ownership* test of Section 1603(b)(2) into the question whether a foreign state holds "effective *control* over a majority of a corporation's board of directors." Dole Br. 23 (emphasis added). This construction is even further afield. It introduces the concept of *control* of directors into a statute that by its text focuses on *ownership* of stock. Petitioners' interpretations would change Section 1602(b)(2) into a very different statute that Congress did not enact.

Petitioners' amici would even go so far as to turn the inquiry into a multi-factored balancing test. Br. of Republic of Ireland 22. Not only is this suggestion directly contrary to the text of

Section 1603(b)(2), but it is utterly inconsistent with the very purpose of a jurisdictional test, which is ordinarily to create an administrable, predictable, bright-line rule. *See, e.g., Jerome v. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 549 (1995) (Thomas, J., joined by Scalia, J., concurring in the judgment) (noting that a "clear, bright-line rule . . . ensures that judges and litigants will not waste their resources in determining the extent of federal subject-matter jurisdiction"); *United States v. Ibarra*, 502 U.S. 1, 6 (1991) (approving "what should be a bright-line jurisdictional inquiry") (internal quotation omitted).

That principle is particularly salient in the context of the FSIA. According to petitioners themselves, a central aim of the statute was to promote predictability by removing courts and the Department of State from case-by-case decisionmaking regarding questions of immunity. *See* Dead Sea Br. 31-33; H.R. Rep. No. 94-1487, at 8, reprinted in 1976 U.S.C.C.A.N. 6607 (discussing Tate Letter). Petitioners' balancing, control, and other non-textual tests would reintroduce the very problems the FSIA was designed to eliminate.

2. The Dead Sea petitioners argue that the State of Israel exercises "pervasive control and oversight" through the Government Companies Law, more "than would a similarly situated indirect shareholder under American law." Dead Sea Br. 28, 30. The evidence showed, however, that the State of Israel did not exert substantial control over the day-to-day operations or even the business strategies of the Dead Sea Companies. *See* pp. 2-5, *supra*. The district court found that the State of Israel's power stemmed from its ownership of the corporate parent, not from any form of special control. *See* Pet. App. 78a ("The control maintained by the government was derived mainly from the government's indirect ownership of the entities."). The Ninth Circuit found that the Companies were "*independent* commercial enterprises." *Id.* at 26a (emphasis added). Indeed, the Dole petitioners quote in their brief (Dole Br. 23) the Ninth Circuit's finding that the State of Israel's control "is not

considerably different from the control a majority shareholder would enjoy under American corporate law." Pet. App. 25a.

In any event, the meaning of the statute is a matter of U.S. law, not Israeli law. *JP Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure, Ltd.*, 122 S. Ct. 2054, 2060-61 (2002). The Dead Sea Petitioners confuse *ownership* with *control*. Section 1603(b)(2) does not create a *control* test, but a *majority ownership* test. Even the Dole petitioners acknowledge that the question of "control" is "different and 'more expansive' than ownership of a majority of shares or ownership interest." Dole Br. 36-37. *"Congress did not want the FSIA's majority ownership requirement to cover the broader category of control." Id.* at 37. The Dead Sea petitioners would rewrite Section 1603(b)(2) into the kind of statutory "control" provision which Congress has enacted in other contexts, *see* n. 6, *supra*, but not in the FSIA.[13]

The Dead Sea petitioners' argument is essentially an attempt to smuggle the FSIA's "organ" test into the entirely separate "ownership" inquiry of Section 1603(b)(2). The "organ" test asks "'whether the foreign sovereign *supervised and/or exercised control over* the entity so as to circumscribe the entity's ability to act independently'" and "'whether the entity advanced the interests of the foreign sovereign.'" Pet. App. 71a (quoting Dead Sea Companies' own brief) (emphasis added). Both the district court and the court of appeals held that the Dead Sea Companies did *not* qualify for FSIA immunity under the "organ" test, *id.* at 24a-26a, 71a-79a, and neither set of petitioners sought certiorari

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[13] Even if the state of Israel had "controlled" the Dead Sea Companies, that would not satisfy the test of Section 1603(b)(2). Control by a majority shareholder is an insufficient basis to disregard the corporate form. *See* 1 W. Fletcher, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 41.10, at 615 (rev. perm. ed. 1990) (alter ego doctrine does not apply on basis of "[m]ere domination and control of the corporation by the sole or principal shareholder").

with respect to that issue. The Dead Sea Companies' "control" argument is relevant, if at all, only to the "organ" test, which is not before this Court.

D. Petitioners' Approach Would Frustrate The Purposes of the Statute

"In 1976, Congress enacted the FSIA in order to achieve two basic objectives. First, the Act was intended to provide fairness to American plaintiffs, who previously had no established procedural remedies against foreign states. Second, the Act was intended to align the United States with international practice." William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 TUL. L. REV. 535, 537 (1991). Petitioners' construction of the statute would frustrate both purposes.

1. The FSIA expressly declares (28 U.S.C. § 1602) that its purpose is to adopt the "restrictive theory" of immunity. In this regard, the FSIA was intended to make United States law consistent with international practice. The House Report states that the FSIA "would codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law." H.R. Rep. No. 94-1487, at 7, reprinted in 1976 U.S.C.C.A.N. 6605. There is "a wide acceptance of the so-called restrictive theory of sovereign immunity; that is, that the sovereign immunity of foreign states should be 'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform." H.R. Rep. No. 94-1487, at 14, reprinted in 1976 U.S.C.C.A.N. 6613. *See also Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992); *Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 487 (1983).[14]

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[14] *See also* FOREIGN SOVEREIGN IMMUNITIES ACT, HEARINGS ON H.R. 11315

Petitioners' approach would frustrate this purpose by expanding immunity based solely on purported "ownership" far beyond that afforded by any other country in the world. It would move the FSIA away from its avowed purpose of aligning U.S. law with international practice by aggravating the difference between U.S. law and the laws of other countries.

The prevailing international rule provides that foreign state-owned entities with separate legal personalities generally are not entitled to sovereign immunity based on direct foreign ownership, let alone "tiered" corporate structures. "Nationalized corporations and other state owned enterprises, even those directly owned by a government, do not expect special immunity protection anywhere in the western world, including the very countries where the corporations were formed, except in United States courts."[15] "No other country in the world has adopted state ownership as a basis for conferring sovereign legal status on commercial corporations. In fact, since 1976 most jurisdictions that have enacted legislation codifying the restrictive theory have expressly rejected the idea."[16] Three codifications of

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BEFORE THE SUBCOMM. ON ADMIN. LAW AND GOVERNMENTAL RELATIONS OF THE HOUSE COMM. ON THE JUDICIARY, 94th Cong. 33 (1976) ("1976 Hearings") (testimony of Monroe Leigh, Legal Adviser, Department of State) (responding negatively when asked whether any provisions in the FSIA were significantly different than immunity treatment in other commercially developed nations).

[15] Jane H. Griggs, Note, *The Foreign Sovereign Immunities Act: Do Tiered Corporate Subsidiaries Constitute Foreign States?*, 20 W. NEW ENG. L. REV. 387, 432 (2001).

[16] William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 TUL. L. REV. 535, 565-66 (1991); *see also id.* at 551-65, 565 n.149 (surveying Western Europe and showing that no other country grants immunity based on tiered ownership); Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 5 N.Y. INT'L L. REV. 51, 54, 57, 59, 60 (1992) (providing overall study of European sovereign immunity traditions and finding that England bases agency immunity on the existence of sovereign

international law – the United Kingdom's State Immunity Act,[17] the Council of Europe's European Convention on State Immunity,[18] and a proposal by the International Law Commission of the United Nations[19] – provide immunity based on performance of a governmental purpose, not tiered ownership. European decisions illustrate that the immunity claimed by the Dead Sea Companies in this case would be without international precedent.[20] The Dole petitioners acknowledge that "most

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authority, France bases agency on the existence of a public nature, and Germany does not extend immunity to governmental agencies at all).

[17] Section 14(2) of the United Kingdom State Immunity Act of 1978 provides: "A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if – (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b) the circumstances are such that a State . . . would have been so immune." 17 I.L.M. at 1127. Numerous jurisdictions have enacted identical provisions. *See* Pakistan State Immunity Ordinance, 1981, § 15, reprinted in MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY at 25, U.N. Doc. ST/LEG/SER.B/20, U.N. Sales No. E/F.81.V.10 (1982) (hereafter "U.N. MATERIALS"); Singapore State Immunity Act, 1979, § 16, reprinted in U.N. MATERIALS at 33; South Africa Foreign Sovereign Immunity Act, 1981, § 2, reprinted in U.N. MATERIALS at 35.

[18] European Convention on State Immunity, May 16, 1972, art. 27(2), Europ. T.S. No. 74, at 4, reprinted in 3 Europ. Conv. & Agree. 39 (1972-74).

[19] Report of the Int'l Law Comm'n on the Work of its Forty-Third Session, U.N. GAOR Int'l Law Comm., 43d Sess., Supp. No. 10, U.N. Doc. A/46/10 (1991).

[20] *See Trendtex Trading Corp. v. Central Bank of Nig.*, [1977] 1 Q.B. 529, 579 (Central Bank of Nigeria not immune); *Swiss Isr. Trade Bank v. Government of Salta*, [1972] 1 Lloyd's Rep. 497, 507 (foreign state-owned bank not immune); *Central Bank of Nigeria Cases*, Decisions of the Frankfurter Landgericht (municipal court of Frankfurt) dated Dec. 2, 1975 & Aug. 25, 1976, 1976 NJW 1044, 65 I.L.R. 131, 134 (no immunity); *National Iranian Oil Co. Legal Status Case*, No. 5 W 24/80, 21 Oct. 1980, 1980 RIW/AWD 874, 65 I.L.R. 199 (Germany) (rejecting claim of sovereign immunity by National Iranian Oil Co., even though its shares were owned by Iran); *Dhlellemes et Masurel S.A. v. Banque Centrale de la Republique de*

foreign immunity laws outside the United States do not treat government-owned corporations as 'foreign states,'" Dole Br. 35, and their attempt to harmonize their position with these foreign laws is untenable.[21]

2. A second important congressional objective was to overcome difficulties faced by American citizens in bringing claims against foreign enterprises connected to foreign states. Petitioners acknowledge that "the Act was explicitly designed to 'facilitate . . . litigation against foreign states.'" Dole Br. 47 (ellipsis and internal quotation in original). Congress was acutely aware of the unfair situation that faced a United States plaintiff who had a claim against a foreign enterprise, but had little way of knowing how, when, or if that claim would be heard in court. "American citizens are increasingly coming into contact with foreign states and entities owned by foreign states." H.R. Rep. No. 94-1487, at 6, reprinted in 1976 U.S.C.C.A.N. 6605. "These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes." *Id.* A central aim of the FSIA was to "assure that American citizens [were] not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions . . . ." 1976 Hearings at 24 (testimony of Monroe Leigh, Legal Adviser,

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Turquie, Judgment of Dec. 4, 1963 (Belgium), 45 I.L.R. 85, 86-87 (denying immunity claimed by Turkish Central Bank); *Cameroon Development Bank v. Rolber*, Judgment of Nov. 18, 1986, 79 I.L.R.532 (France) (denying immunity to bank owned by the state of Cameroon); *Corporacion del Cobre*, Judgment of Nov. 29, 1972, 12 I.L.M. 187, 189 (1973); 65 I.L.R. 57, 59-60 (France) (Chilean Copper Corporation not immune).

[21] The Dole petitioners insist that foreign laws "afford foreign-owned companies essentially the same immunity that is available under the FSIA because . . . they give immunity to entities performing sovereign acts." Dole Br. 35. The Dole petitioners confuse the "majority ownership" test of Section 1603(b)(2) with the "organ" test. It is the latter test that confers immunity based on the performance of sovereign acts.

Department of State). When signing the FSIA into law, President Gerald Ford made clear that the statute would facilitate claims against foreign companies:

> This statute will also make it easier for our citizens and foreign governments to turn to the courts to resolve ordinary legal disputes. In this respect, the Foreign Sovereign Immunities Act carries forward a modern and enlightened trend in international law. And it makes this development in the law available to all American citizens.

Public Papers of the Presidents, Gerald R. Ford, 1976-77, Book III 2610 (1979).

Petitioners' construction would frustrate this congressional purpose in several ways. First, it would dramatically expand the number of corporations which could qualify for the benefits of the FSIA. Petitioners' interpretation would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as it can be deemed to be majority-owned by a foreign state through a process of multiplying indirect shareholder stakes. Petitioners themselves assert that the tiered ownership structure for which they seek immunity is "widespread." Dole Br. 25 (internal quotation omitted). The number of entities qualifying for FSIA status will thus be significantly increased, to the detriment of U.S. citizens and of U.S. companies that must compete with these foreign entities. *See Dewhurst v. Telenor Invest AS*, 83 F. Supp.2d 577, 594 (D. Md. 2000) ("[A]llowing tiering gives these subsidiary corporations a competitive advantage over private companies. These remote corporations receive the procedural protections of the FSIA, as well as potential immunity from suit, that private corporations do not receive.").

Compounding the problem, petitioners would extend the protections of the FSIA to foreign corporations whose entitlement to such benefits would be difficult to predict in advance. Congress was aware that in many cases a United States

citizen may not even know that an entity with whom he or she is dealing has ties to a foreign state, until after a claim is brought.[22] If even foreign corporations that are directly owned by a foreign government may have a "hidden identity," the problem is certainly much worse in the case of corporations whose purported ownership by a foreign state is masked by several tiers of intermediate corporations. Rarely does the name of a corporation reflect that it is the subsidiary in a chain whose top member is owned by a foreign state. Information about the identity of shareholders of foreign corporations may not be readily accessible, even to sophisticated litigants. This hidden status is a trap for unwary persons who contract or otherwise deal with a foreign corporation on the assumption that the normal rules of jurisdiction apply.

The surprise factor was a concern of the English Court of Appeal in the landmark 1977 decision which resulted in the judicial abrogation of the absolute doctrine of foreign sovereign immunity in the United Kingdom. Lord Shaw stated:

> Those who contemplate entering into transactions with bodies which may be in a position to claim sovereign immunity are entitled at least to the opportunity of assessing any special risk which may arise. How can they know that such a risk lurks in dealing with a body which assumes a guise and bears a title appropriate to a commercial or financial institution?[23]

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[22] "[The situation may arise] when an American property owner agrees to sell and to a real estate investor that turns out to be a foreign government entity . . . ." H.R. Rep. No. 94-1487, at 7, reprinted in 1976 U.S.C.C.A.N. at 6605. "In a modern world where foreign state enterprises are every day participants in commercial activities, [the FSIA] is urgently needed legislation." *Id.*

[23] *Trendtex Trading Corp. v. Central Bank of Nig.*, [1977] 1 Q.B. 529, 574.

The problem already arises in U.S. litigation.[24] Even defense counsel can be surprised to learn, well into the litigation process, that their client is a "foreign state."[25] Petitioners' proposal would worsen the problem.

Petitioners' expansion of the FSIA would also abrogate important rights and remedies which would otherwise be available to plaintiffs in ordinary civil litigation. Designation of an entity as a foreign state has critical procedural implications. The FSIA eliminates personal jurisdiction principles of state long-arm statutes and requires plaintiffs to satisfy more restrictive FSIA provisions. Under the commercial activity exception to the FSIA, 28 U.S.C. § 1605(a)(2), the claim must arise from a commercial activity performed in the United States, or from "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or from "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere [which] causes a direct effect in the United States." Under the FSIA standard, the commercial activity "bearing the nexus [to the United States] must be the same activity that gives rise to the claim." Hoffman, 65 TUL. L. REV. at 576. "Thus, there will be situations where United States courts will lack jurisdiction over a matter as a result of classifying the corporation as a foreign state – e.g., where a corporation does business in the United States but the actual claim arises from business transacted elsewhere and with no effect on the United

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[24] *See, e.g., O'Connell Machinery Co. v. M.V. "Americana,"* 566 F. Supp. 1381, 1383 (S.D.N.Y. 1983), *aff'd*, 734 F.2d 115 (2d Cir.), *cert. denied*, 469 U.S. 1086 (1984) (fact that Italian Line was a shipping company "indirectly owned" by Italian state enterprise disclosed to plaintiff several weeks after complaint was filed); *see also Velidor v. L/P/G BENGHAZI*, 653 F.2d 812, 814-16 & n.3 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982).

[25] *See Geveke & Co. Int'l v. Kompania Di Awa I Elektrisidat Di Korsou, N.V.*, 482 F. Supp. 660, 661 n.4 (S.D.N.Y. 1979).

States." *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 689 (S.D.N.Y. 1996).

Moreover, the FSIA prohibits jury trials, even where an exception to immunity (such as the commercial activities exception) is found to apply. *See* 28 U.S.C. § 1441(d). Thus, petitioners' broad interpretation of the statute would eliminate the right to a jury trial in a wide range of cases.[26] Section 1608(b) prescribes different rules for service of process depending on whether the defendant is a foreign state or an agency or instrumentality of a foreign state. *See* 28 U.S.C. 1608(b). Section 1610(b) also imposes a host of restrictions on a plaintiff's ability to attach or execute on the property of an agency or instrumentality. And unless an exception is shown to apply, the court lacks jurisdiction and must dismiss the case, effectively immunizing a commercial entity from suit. Significantly, the burden of production, although not of persuasion, as to the applicability of an exception to sovereign immunity shifts to the plaintiff once an entity is deemed a foreign state. *See* H.R. Rep. No. 94-1487, at 17, reprinted in 1976 U.S. C.C.A.N. 6616.

This Court should not lightly presume that Congress meant

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[26] The automatic loss of the plaintiff's Seventh Amendment right to a jury trial has been the subject of commentary urging that, in this respect, the FSIA might be unconstitutional. *See* Danny Abir, *Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations*, 32 STAN. J INT'L L. 159, 171-72, 178 (1996) (arguing that, for purposes of suits against foreign government-owned corporations, the FSIA's non-jury trial provision is unconstitutional because, at common law, jury trials were permitted against entities such as the East India Company); Kimberly K. Hill, Note, *Foreign Government-Owned Corporations, the Foreign Sovereign Immunities Act, and the Right to Jury Trial*, 1982 DUKE L.J. 1071 (same); Committee on Int'l Litigation, New York State Bar Assn., *Foreign State Defendant's Right to Trial by Jury Under the Foreign Sovereign Immunities Act*, 26 TEX. INT'L L.J. 71 (1991) (presenting an overview of the arguments for and against jury trials under the FSIA).

to impose these substantial procedural burdens on U.S. plaintiffs. *See Hyatt Corp.*, 945 F. Supp. at 690 ("Given these factors – a) the prevailing international rule and the earlier United States cases presuming that corporations were not protected by sovereign immunity; b) Congress's explicit reversal of this presumption in the case of corporations owned by foreign states or political subdivisions; c) the fact that a broad interpretation would further extend foreign state status to corporations extremely remote from sovereign control; and d) the important consequences that flow from such a classification," Congress "would have been as explicit as it was in extending immunity to corporations majority-owned by foreign states or their political subdivisions" if it had intended to confer immunity based on tiering).[27]

Petitioners' proposal would also compound the complexities of litigation. It would require parties and courts to trace potentially tortuous chains of indirect corporate stockholdings.[28] For example, the Dead Sea Companies are part of an extended, worldwide group of related commercial entities, with affiliates in such far-flung locations as the United Kingdom, the Netherlands, Japan, South Africa, and Brazil. JA 230-31. Dead Sea's own designated witness was unable to recall all of Israel

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[27] The ABA Working Group cited by petitioners (Dole Br. 46, Dead Sea Br. 34) in fact recognizes these potential problems. ABA Working Group, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 523 (2002) ("We nonetheless recognize the merit in some of the points made by the courts refusing to accord the protections of the Act to tiered entities."). Although the Working Group favors presumptive immunity for tiered entities, it recommends enactment of a congressional amendment – a change in the statute as written.

[28] For disputes over foreign ownership and corporate status, see *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 415 (2d Cir.), *cert. denied*, 464 U.S. 850 (1983); *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 271 (3d Cir. 1980); *Jet Line Serv., Inc. v. M/V MARSA EL HARIGA*, 462 F. Supp. 1165, 1172 (D. Md. 1978).

Chemicals' affiliates "[b]ecause there are such a large number of companies." JA 231. Although petitioners deny that tracing stock ownership would pose difficulties, tellingly the Dead Sea petitioners do not press their immunity claim with respect to BCL, "[f]or the sake of simplicity." Dead Sea Br. 7 n.4.

3. Petitioners insist that their theory is necessary to avoid "friction" in international relations. That claim is dubious. The Solicitor General, representing the United States, has not endorsed it. The State of Israel has not appeared in this litigation on behalf of the Dead Sea Companies. Only one nation – the Republic of Ireland – has appeared as amicus, and its arguments do not call the Ninth Circuit's judgment into question.[29] Stretching the FSIA in the manner sought by petitioners will itself be source of friction and embarrassment for the political branches. *See Mexico v. Hoffman*, 324 U.S. 30, 36 (1945) ("[R]ecognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations.").

Moreover, petitioners' claim of "friction" is groundless because no other country in the world affords the kind of immunity sought by petitioners – least of all the State of Israel, which does not grant the Dead Sea Companies immunity in its own courts. *See* JA 261; *see also* Joseph W. Dellapenna,

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[29] Ireland does not suggest that the insurance company on whose behalf it appears would qualify for immunity in the courts of any other nation. Nor does Ireland suggest that it even considered U.S. law in deciding how to take over an insolvent insurance company in 1985. Indeed, Ireland admits that the transaction could have been structured in a way that would have qualified for FSIA immunity under the Ninth Circuit's view. *See* Ireland Br. 19 ("as a strict legal matter the Minister could have held legal title to all but six of [the insurer's] shares as the government typically does when it owns and operates commercial ventures"). In any event, Ireland contends that the insurance company qualifies for immunity under the FSIA as an "organ," *id.* at 10-11 n.9, and therefore will not be affected by the outcome of this case.

Foreign State Immunity in Europe, 5 N.Y. INT'L L. REV. 51, 51 (1992) (arguing that one of the most telling factors is how a particular entity is treated by its own government). It cannot reasonably be argued that the United States – which has already taken a more than generous step in extending immunity based upon direct ownership – has an obligation to go even further and bestow immunity based on tiered and indirect "ownership."

It is not plausible to describe the judgment below as "directing" foreign countries or "dictating" to them with regard to how corporate entities are to be structured. *Contra* Ireland Br. 11. The FSIA provides a benefit in the form of immunity, which foreign states are under no obligation to accept. The United States is fully entitled to prescribe the conditions under which it is offered.

Nor does the court of appeals' judgment lead to "arbitrary results." *Contra* Dole Br. 26; Dead Sea Br. 35. It is certainly reasonable to assume as a general rule that "a foreign state's sovereign interest in a lower tier corporation is far more likely to be significantly less than in a corporation directly owned."[30] Indeed, it is petitioners' approach that would lead to arbitrary results, by frustrating the purposes of the FSIA and extending immunity to a potentially unlimited number of tiered subsidiaries

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[30] ABA Working Group, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 524 (2002); *see also In re Ski Train Fire*, 198 F. Supp.2d at 426 ("'in light of the attenuated relationship between foreign states proper and many of their corporate subsidiaries,' Congress did not intend to grant immunity to corporations beyond the first tier of state ownership") (citation omitted); *Dewhurst*, 83 F. Supp.2d at 594 ("A corporation directly owned by a foreign government is likely controlled by that government, thereby invoking Congress's concerns about sovereign immunity. Allowing tiering, however, would extend immunity to corporations far down the chain of ownership, even if these subsidiaries are only remotely controlled by the foreign government."); *Hyatt Corp.*, 945 F. Supp. at 689 (under petitioners' view, "[m]any corporations with distant government investment, even if far removed from sovereign control, would be covered").

based on a process of multiplying indirect shareholder interests.

Further, any claim of "friction" would be untenable in light of the immunity provided under Section 1603(b)(2) to an "organ" of a foreign state or a political subdivision thereof. Although petitioners all but ignore this provision, it assures foreign states that agencies or instrumentalities performing genuinely sovereign functions will receive immunity the FSIA. The "organ" test considers "whether the entity engaged in a public activity on behalf of the foreign government." Pet. App. 24a. "In making this determination, courts examine the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law." *Id.* This test fully addresses the legitimate concerns of foreign states. Tellingly, in this case, the district court and Ninth Circuit both held that the Dead Sea Companies could not qualify as "organs" of a foreign state, and petitioners have not sought review of that holding in this Court.

4. Petitioners complain that the judgment below reinstates the separate entity rule, which Congress did not enact in the FSIA. Dole Br. 34; Dead Sea Br. 36-38. That argument is incorrect. The "separate entity" rule was a facet of the absolute immunity doctrine. *See* Hoffman, 65 TUL. L. REV. at 584 n.38 ("The separate entity rule developed only in jurisdictions adhering to the doctrine of absolute immunity *ratione personae* because the rule derives from the distinction, inherent only in the absolute doctrine, between the sovereign's personality and a corporate personality distinct from the state."). Because Congress meant the FSIA to embody the restrictive theory of immunity, rather than absolute immunity, Congress did not intend to adopt the separate entity rule, either. But that hardly shows that Congress meant to ignore the formalities of corporate law or the distinctions among different corporate entities. Quite the contrary: Section 1603(b)(1) requires an entity claiming immunity to demonstrate that it is "a separate legal person."

Congress thereby incorporated the concept of separate corporate personalty into the FSIA's definitional section. This Court has held that the assets of the foreign-government-owned corporation are to be treated as distinct from the foreign government itself. *See First Nat'l City Bank*, 462 U.S. at 625-26, 627. This Court reached that conclusion by applying principles of the FSIA.

5. Petitioners point to a statement in the FSIA's legislative history citing "'a mining enterprise'" as an example of an agency or instrumentality under the FSIA. Dole Br. 29 (quoting H.R. Rep. No. 94-1487 at 16). Petitioners misread the House Report, which nowhere suggested that mining enterprises (and other listed entities) will automatically satisfy the definition of agencies and instrumentalities. The House Report merely stated that these entities *could* be included, *if* they met the other statutory requirements of an agency.

To the extent the FSIA's legislative history is relevant, it provides further reason to reject petitioners' theory. If Congress intended to depart so drastically from past practice and customary international law as to also extend immunity protection to tiered subsidiaries of foreign-government-owned corporations, Congress would surely have discussed the issue somewhere in the text or legislative history. Petitioners' proposed statutory construction suffers from the mystery of the dog that did not bark.

6. Petitioners draw an analogy to U.S. government-owned corporations, arguing that "many portions of the FSIA are 'designed to place foreign governments in parity with our own federal government.'" Dole Br. 31 (citation omitted). Petitioners' analogy, however, supports the Ninth Circuit's judgment. U.S. government-owned corporations have traditionally been subject to suit in tort and contract. *See* n.10, *supra*. Federally chartered corporations are regarded as separate and distinct from the government. 6A Charles A. Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 1562 (1999). They do

not generally enjoy immunity from suit, even if a sue-and-be-sued clause is not included in their charter. *See Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939) ("[T]he government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work. . . . [T]his would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted."); *Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 312 U.S. 81, 85 (1941) ("there is no presumption that the agent is clothed with sovereign immunity").

Moreover, federally chartered corporations are not ordinarily entitled to exemption from jury trials or other procedural protections. Generally, the corporations are on "an equal footing with private parties as to the usual incidents of suits." *J.G. Menihan Corp.*, 312 U.S. at 85-86. They are not automatically entitled to remove suits against them to federal court, because suits involving federal government-owned or chartered corporations do not without more create federal question jurisdiction. Under 28 U.S.C. § 1349, there is federal jurisdiction of an action by or against a corporation only if the United States owns more than half its capital stock. "There is no jurisdiction of a suit by or against a federally-chartered corporation, in which the United States does not own more than half the stock, merely because of the federal charter. Federal courts can hear this kind of case only if there is some other basis of federal jurisdiction." 13A Charles A. Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3571. Further, "a congressional charter's 'sue and be sued' provision may be read to confer federal court jurisdiction if, but only if, it specifically mentions the federal courts." *American National Red Cross v. S.G.*, 505 U.S. 247, 255 (1992).

Petitioners ignore these telling points. Instead, they focus on the designation of certain subsidiaries of the Reconstruction Finance Corporation as federal "agents or instrumentalities." Dole Br. 30-31. *Keifer* made clear, however, that this description

was *not* made for immunity purposes; the subsidiaries lacked any such immunity. 306 U.S. at 389. The relevance of petitioners' argument to the FSIA is therefore obscure. Some federally chartered corporations are designated as "agencies," while others are not.[31] But such designations occur outside the context of immunity, under statutory schemes that bear little resemblance to Section 1603(b)(2) of the FSIA. The Judicial Code, for example, defines the term "agency" to include "any corporation in which the United States has a proprietary interest." 28 U.S.C. § 451. The Freedom of Information Act includes a "Government controlled corporation" as part of its definition of "agency." 5 U.S.C. § 552(e). These markedly different definitions underscore the distinctive text of the FSIA.

7. In the end, the Dole petitioners suggest that the FSIA is not an "immunity" statute at all (despite its name), but primarily a forum-selection statute that operates to channel litigation involving foreign-government-owned corporations into federal court. Dole Br. 28. The Dole petitioners suggest, in effect, that there is no harm in stretching the FSIA to include the Dead Sea Companies because they will ultimately be held non-immune under the commercial activities exception to the FSIA. Not surprisingly, the Dead Sea petitioners take a different view.

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[31] Several important federally chartered corporations are expressly deemed *not* to be federal agencies or instrumentalities. *See* 47 U.S.C. § 731 (Comsat); *id.* at § 396(b) (Corporation for Public Broadcasting not federal agency, even though board appointed by President); 42 U.S.C. § 2996d(e)(1) (Legal Services Corporation not federal agency, even though board appointed by President). Petitioners rely on *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995), where this Court held that Amtrak is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the government by the Constitution. But this Court did not hold that Amtrak is an "agency or instrumentality" of the government for all purposes. In fact, 49 U.S.C. § 24301(a)(3) provides that Amtrak "is not a department, agency, or instrumentality of the United States Government." In *Lebron*, this Court opined that "the statutory disavowal of Amtrak's agency status deprives Amtrak of sovereign immunity from suit." 513 U.S. at 592.

They have insisted from the beginning of this litigation that they "are immune to suit under the doctrine of sovereign immunity." JA 57.

Even if the disagreement among petitioners were not enough to dispose of the Dole petitioners' attempt to recast the nature of the FSIA, their argument begs the question. The legislative history they cite explains that the FSIA "provides a comprehensive jurisdictional scheme in cases involving *foreign states*. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision . . . ." H.R. Rep. No. 94-1487, at 13, reprinted in 1976 U.S.C.C.A.N. 6611 (emphasis added). Petitioners' "uniformity" argument assumes that the Dead Sea Companies qualify as "foreign states" within the meaning of the House Report's discussion, but that of course is the question presented by this case. Certainly, a tiered subsidiary is far removed from the traditional sovereign instrumentality that likely was within the contemplation of the House Report.

There is no need to stretch the FSIA to provide automatic access to a federal forum for a tiered subsidiary. A foreign corporation can avail itself of alienage or diversity jurisdiction to remove a case to federal court, under the system that the Founders believed would fully address the interests of foreign defendants. *See JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure*, 122 S. Ct. 2054, 2058 (2002). Petitioners are wrong in suggesting that there is no harm in stretching the FSIA to cover tiered subsidiaries. The procedural burdens that petitioners seek to impose on plaintiffs are directly contrary to Congress' purposes in enacting the FSIA.[32] And the

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[32] For example, a key assumption of the student note upon which the Dole petitioners rely (Dole Br. 28) is that foreign government-owned corporations will lose their immunity because "people and organizations accustomed to dealing with these enterprises generally obtain a waiver of immunity, bringing the case within the exception provided by section 1605(a)(1)." Rebecca J. Simmons, Note, *Nationalized and Denationalized Commercial Enterprises*

"uniformity" championed by petitioners is illusory. They propose to channel to federal court garden-variety tort and contract claims involving not foreign sovereigns but entities that the Dole petitioners at least predict will be held *non-immune*. This system will not promote "uniformity." The relevant tort and contract claims asserted against these non-immune entities will typically be governed by the laws of the several States. *See First Nat'l City Bank*, 462 U.S. at 620-21 (FSIA does not displace substantive law of liability). State laws are not "uniform." Further, state courts, rather than federal courts, are best positioned to adjudicate the claims arising from state law. In short, petitioners' rule would violate both the text and purposes of the FSIA.

II. A CORPORATION IS NOT COVERED BY THE FSIA IF THE FOREIGN STATE DOES NOT OWN A MAJORITY OF SHARES AT THE TIME THE PLAINTIFF COMMENCES SUIT.

A. The Text and Structure of the FSIA

The plain meaning of the use of the present tense language in the FSIA requires that a court evaluate a foreign corporation's status as of the time the complaint is filed and the defendant invokes the protection of the statute. The FSIA is not ambiguous. The statute repeatedly uses present tense:

> (b) An "agency or instrumentality of a foreign state" means any entity--
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> (1) which *is* a separate legal person, corporate or otherwise, and
>
> (2) which *is* an organ of a foreign state or political

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under the Foreign Sovereign Immunities Act, 90 COLUM. L. REV. 2278, 2282 (1990). But persons dealing with tiered subsidiaries will frequently fail to obtain such waivers because they will have no reason to suspect that the corporations might qualify for the FSIA.

> subdivision thereof, or a majority of whose shares or other ownership interest *is owned* by a foreign state or political subdivision thereof, and
>
> (3) which *is* neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603 (emphasis added). The language of the section-by-section analysis in the House Report addressing Section 1603 is also written in the present tense. *See* H.R. Rep. No. 94-1487, at 15, reprinted in 1976 U.S.C.C.A.N. 6614. For example, the Report explains that the Act "requires that the entity *be* . . . an organ," or that the shares or other ownership interest "*be* owned by a foreign state (or by a foreign state's political subdivision)." *Id.* (emphasis added).

This Court has held that "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333 (1992) (citations omitted) (deriving the meaning of the statute from Congress' use of "verbs in the past and present perfect tenses"). *See also Ingalls Shipbuilding, Inc. v. Office of Workers Compensation*, 519 U.S. 248, 255 (1997) ("[T]he use of the present tense (i.e., 'enters') indicates that the 'person entitled to compensation' must be so entitled at the time of settlement."); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 63-64 n.4 (1987) ("The fact that Congress consciously chose the past tense to describe the Administrator's new authority to assess civil penalties suggests that Congress knows how to target past violations when it wants to do so."); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (plurality opinion) (noting "[t]he present, active tense of the operative verbs of § 703(a)(1)"); *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 116 (1983) ("This use of the respective tenses is significant"); *Scarborough v. United States*, 431 U.S. 563, 570 (1977) ("It is obvious that the tenses used throughout Title IV were chosen with care."); *Barrett v. United*

States, 423 U.S. 212, 217 (1976) ("Congress knew the significance and meaning of the language it employed. It used the present perfect tense elsewhere in the same section ..., in contrast to its use of the present tense ('who is') in §§ 922(h)(1), (2), and (3)."); *Otte v. United States*, 419 U.S. 43, 49-50 (1974) (attaching significance to fact that statute "speaks in the past tense as well as the present").

In *Stafford v. Briggs*, 444 U.S. 527, 535-36 (1980), for example, this Court construed the Mandamus and Venue Act of 1962, which provided for mandamus actions to compel an officer or employee of the United States to perform a duty owed to the plaintiff. This Court noted that the statute referred to an action "in which a defendant *is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority* . . . ." 28 U.S.C. § 1391(e) (emphasis in original). This Court concluded that "[t]he highlighted language, cast by Congress in the present tense, can reasonably be read as describing the character of the defendant at the time of the suit." 444 U.S. at 535-36.

Congress' unambiguous use of the present tense in the FSIA must be given its plain meaning: to qualify as an agency or instrumentality of a foreign state, a defendant must be majority-owned by the foreign state at the time the complaint is filed and the defendant seeks to invoke jurisdiction under the Act. Petitioners contend that "the use of the word 'is' could speak to a variety of situations," Dead Sea Br. 42 (citation omitted) – including, apparently, events in the 1960s and 1970s, when petitioners allege the relevant events in this case occurred. Dole Br. 8-9. Only the most tortured, unnatural reading of "is" – the present tense of the verb "to be" – could lead to the interpretation petitioners suggest.

Petitioners would rewrite § 1603(b)(2) to say:

> any corporation which *was, at the time of the acts upon which the complaint is based,* an organ of a foreign state

> . . . or a majority of whose shares . . . were owned, *at the time of the acts upon which the complaint is based*, by a foreign state or political subdivision thereof.

As the court of appeals opined, "[t]he statute does not say that it applies to an entity that used to be a state, although Congress could easily have said so." Pet. App. 20a.

The court of appeals' view is fortified by the comparable rule of diversity jurisdiction. The diversity jurisdiction example is particularly apt, because the House Report in fact cited the diversity jurisdiction clause of Art. III, § 2, cl. 1 (coupled with the necessary and proper clause of Art. I, § 8, cl. 3) as a constitutional basis for the FSIA. *See* H.R. Rep. No. 94-1487, at 12, reprinted in 1976 U.S.C.C.A.N. 6611. The rule under the diversity statute is clear: citizenship of the parties at the time of trial is the basis for determining whether diversity jurisdiction is available. *See Anderson v. Watt*, 138 U.S. 694, 702-03 (1891) ("the inquiry is determined by the condition of the parties at the commencement of the suit"); *accord Louisville, N.A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U.S. 552, 556 (1899).

Petitioners cannot point to any language in Section 1603(b)(2) to support their interpretation. Instead, they contend that Congress sometimes uses the present tense to refer to "timeless" concepts. Dole Br. 40, 42. But majority ownership status is not a "timeless" matter. Ownership shares fluctuate, and companies are nationalized or privatized. It is therefore highly unlikely that Congress would have considered ownership as a "timeless" concept or that it would have wanted to refer to "the past, present, or future 'all at the same time'" in some sort of "indefinite" way. Dead Sea Br. 42 (citations omitted).

Petitioners also point to other provisions of the FSIA which allegedly demonstrate that this Court is free to disregard the present tense of Section 1603(b)(2). But the cited provisions are inapposite. For example, the Dole petitioners (Dole Br. 41-42) refer to Section 1607(a)(7), which contains a host of past tense

verbs indicating that it clearly refers to past conduct. *See* 28 U.S.C. § 1607(a)(7) ("personal injury or death that was caused by an act of torture"); *id.* at § 1607(A) ("if the foreign state was not designated as a state sponsor of terrorism"); *id.* at § 1607(B)(ii) ("neither the claimant nor the victim was a national of the United States"). Section 1603(b)(2) is entirely different.[33]

Remarkably, petitioners give short shrift to the most relevant statutory provisions besides Section 1603(b)(2) – Section 1608, which requires special service procedures for a foreign state, and Section 1610, which imposes special rules for enforcing a judgment. These provisions plainly contemplate that the entity in question would actually qualify as a foreign state or an agency or instrumentality *at the time of suit*. After all, a plaintiff can commence a suit "against a foreign state," or "against an agency or instrumentality,"only if the defendant *is* such an entity at the time of the suit. The court of appeals opined that, based on these provisions, "[w]e have no doubt that, in enacting the FSIA, Congress had in mind suits brought against entities that are currently foreign states." Pet. App. 20a. Petitioners similarly acknowledge that "Congress contemplated suits against sitting foreign governments and the entities they continue to own or operate at the time of suit" and that "the FSIA is primarily concerned with suits against sitting governments and their current agencies or instrumentalities." Dole Br. 48. Petitioners' attempt to claim protection for the Dead Sea Companies is unavailing.[34]

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[33] The Dole petitioners also cite Section 1605(a)(6), which refers to an arbitration that "takes place or is intended to take place in the United States." That locution plainly encompasses arbitrations that have *already* taken place; otherwise, the reference to future arbitrations that are "intended to take place" would be meaningless. No such textual basis exists in Section 1603(b)(2) for applying anything other than the present tense.

[34] Petitioners contend that the practical effect of applying the service and execution provisions to privatized entities would not be severe because one of the FSIA's service provisions for agencies and instrumentalities is no

B. The Purposes of the Statute.

It would be difficult to think of a more dramatic expression by a government that its direct interest in a company has ended than privatization. Yet petitioners insist that applying the FSIA to divested foreign corporations is necessary to serve the statute's purposes. They are wrong. *See* Clinton L. Narver, *Putting the "Sovereign" Back in the Foreign Sovereign Immunities Act: the Case for a Time of Filing Test for Agency or Instrumentality Status*, 19 B.U. INT'L L.J. 163, 206 (2001) ("[T]he time of filing test is superior to the alternative tests for agency or instrumentality status for three reasons: first, the time of wrongdoing test lacks a sound doctrinal foundation; second, only the time of filing test properly adheres to the principal rationale of foreign sovereign immunity, i.e., respect for foreign sovereign status; and third, only the time of filing test avoids potential constitutional problems arising from the FSIA's deprivation of the right to trial by jury in suits against changed-status foreign corporations.").[35]

Petitioners' principal argument is that, without their rule, a

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different from that used for domestic corporations and because "the execution provisions strip agencies or instrumentalities of foreign governments of almost all immunity from execution." Dole Br. 48. The practical effect is beside the point. The fact that Congress prescribed special rules for service of process and execution shows that Congress intended that the entity in question would actually *be* an agency or instrumentality at the time of suit.

[35] Any suggestion that the lower courts have uniformly resolved the question in petitioners' favor would be incorrect. Numerous courts have indicated that the inquiry should be made at the time the claim is filed. *See West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 823 (9th Cir. 1987); *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458, 1460 (9th Cir. 1984); *Ocasek v. Flintkote Co.*, 796 F. Supp. 362, 365 (N.D. Ill. 1992) (dictum); *Rutkowski v. Occidental Chem. Corp.*, 1988 WL 107342 (N.D. Ill. Oct. 5, 1988); *Morgan Guaranty Trust Co. v. Republic of Palau*, 639 F.2d 706 (S.D.N.Y. 1986), *vacated on other grounds*, 924 F.2d 1237 (2d Cir. 1991); *cf. Straub v. A.P. Green*, 38 F.3d 448, 451 (9th Cir. 1994) (applying FSIA where corporation was owned by foreign state at time of suit but not at time of harmful conduct).

court "will necessarily be called upon to pass judgment on the foreign state's actions at the time the cause of action arose." Dead Sea Br. 44. But that concern is already addressed by the act of state doctrine, under which "a court in the United States [may not] declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990). *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (federal court could not pass on the legality of the Cuban expropriation decree because doctrine forbids "passing on the validity of foreign acts of state").

The act of state doctrine avoids any "embarrass[ment]" of foreign governments, Dead Sea Br. 45 n.18, and other issues of sensitive foreign relations. Petitioners' implicit suggestion is that the statute must be judicially rewritten to cover privatized entities because of other potential foreign policy concerns – such as the possibility that a foreign government might indemnify the foreign corporation, Dole Br. 45, a risk not present here, JA 261. But there simply is no rule that federalizes any case with a foreign policy dimension. *See* Louis Henkin, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 151 (2d ed. 1996) ("Congress has never sought to deprive state courts of all jurisdiction of all federal questions, or to authorize removal of all such questions from state to federal courts, even of cases directly involving foreign governments, diplomats, treaties, or other international matters."). Petitioners' argument is reminiscent of their federal "common law of foreign relations" theory, which the court of appeals rejected and regarding which petitioners did not seek certiorari. *See* Pet. App. 18a ("[W]e see no evidence that Congress meant for the federal courts to assert jurisdiction over cases simply because foreign governments have an interest in them . . . .").

Petitioners rely on *The Western Maid v. Thompson*, 257 U.S. 419 (1922), which involved a judicially created immunity doctrine, not a question of statutory interpretation. *The Western*

Maid reflected special in rem admiralty rules applicable to the domestic sovereign, not foreign sovereign immunity.[36] Foreign vessels were subject to different treatment. *See Mexico v. Hoffman*, 324 U.S. 30, 38 (1945) (unanimously denying immunity to a commercial ship owned but not possessed by the Mexican Government). In any event, at the time of *The Western Maid*, United States courts still adhered to the absolute theory of foreign sovereign immunity, and foreign government-owned corporations were rare. Further, the decision in *The Western Maid* was not endorsed by Congress. In fact, Congress responded to the decision in 1925 by extending the right to sue the United States to include claims involving public vessels. 46 U.S.C. App. § 781. *See Blanco v. United States*, 775 F.2d 53, 59 (2d Cir. 1985) ("The *Western Maid* merely added fuel to the fire that had already been building in Congress to [enact] . . . a waiver of sovereign immunity for damages caused by public vessels.").

The status-based immunity cases (Dole Br. 44; Dead Sea Br. 47) are likewise inapposite. They are not based on statutory interpretation. They reflect an interest in avoiding a "chill" of executive or judicial decision-making – a chill that would persist if a government official were subject to suit after leaving public office. *See Nixon v. Fitzgerald*, 457 U.S. 731, 744-45 (1982). The special interest in avoiding a "chill" of government officials' decision-making does not arise with respect to foreign corporations.

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[36] *Cf. The Siren*, 7 Wall. 152 (1869) (allowing a claim against the proceeds of the vessel when sold, but stressing that no claim could be enforced while the Government owned the vessel).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA) defines an "agency or instrumentality of a foreign state" as an entity that is (among other requirements) a separate legal person, such as a corporation, "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. 1603(b)(2). This case presents two questions concerning the interpretation of that phrase:

1. Whether a corporation is an "agency or instrumentality" if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation.

2. Whether a corporation is an "agency or instrumentality" if a foreign state owned a majority of the shares of the corporation at the time of the events giving rise to litigation, but the foreign state does not own a majority of those shares at the time that a plaintiff commences a suit against the corporation.

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In the Supreme Court of the United States

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DOLE FOOD CO., ET AL., PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The United States has a substantial interest in the proper construction of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, which presents the sole basis for civil litigants to obtain jurisdiction over a foreign state in United States courts. The FSIA prescribes the scope of foreign sovereign immunity in light of objective criteria that reflect international legal principles and the United States' national interests, thereby reducing the possibility of international friction concerning determinations of judicial jurisdiction over foreign nations. Properly construed, the FSIA provides reasonably concise and clear rules

for foreign states, litigants, and courts to determine whether a foreign state may be sued. The United States therefore has a significant stake in its correct application and has consistently participated in cases before this Court construing its terms. See, *e.g.*, *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993); *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992). At the Court's invitation, the Solicitor General filed an amicus brief on behalf of the United States at the petition stage of this case.

STATEMENT

This case arises from a toxic-tort civil action in which foreign farm workers brought suit in Hawaii state court against various fruit and chemical companies to recover damages for injuries allegedly resulting from the overseas use of the pesticide dibromochloropropane (DBCP). The original defendants impleaded two additional companies, which in turn sought to remove the case to federal district court. The impleaded companies argued, among other things, that each was an "agency or instrumentality" of a foreign state within the meaning of the Foreign Sovereign Immunities Act of 1976, and was therefore itself a foreign state for purposes of the FSIA. The district court rejected that argument, but allowed removal on other grounds not at issue here. The court of appeals reversed the federal district court's order allowing removal, holding, among other things, that the impleaded companies are not agencies or instrumentalities of a foreign state for purposes of the FSIA. Pet. App. 1a-23a.[1]

1. The FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in our courts," whether state or federal. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). It prescribes "when and how

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[1] Citations to "Pet. App." refer to the petition appendix in No. 01-593 (the Dole petition).

parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and * * * when a foreign state is entitled to sovereign immunity." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6 (1976). The FSIA includes definitions setting out the meaning of its operative terms, including the definition of a "foreign state" and an "agency or instrumentality" of a foreign state. 28 U.S.C. 1603.

Section 1603(a) provides that, except for purposes of Section 1608 (which addresses service of process on a foreign state), a "foreign state" includes a "political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. 1603(a). Subsection (b) of Section 1603 provides:

An 'agency or instrumentality of a foreign state' means any entity—

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. 1603(b). By virtue of a specific provision of the federal removal statute, 28 U.S.C. 1441(d), applicable to suits against a "foreign state" as defined in 28 U.S.C. 1603(a), the FSIA also "guarantees foreign states the right to remove any civil action from a state court to a federal court." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (citing 28 U.S.C. 1441(d)).

2. Respondents brought suit against the petitioners in No. 01-593 (the Dole petitioners) alleging that the com-

panies' overseas use of DBCP caused adverse health effects. The Dole petitioners impleaded the petitioners in No. 01-594 (the Dead Sea Companies), which allegedly supplied some of the DBCP used on the fruit farms. The Dead Sea Companies consist of two companies incorporated in Israel, Dead Sea Bromine Company (DSB) and Bromine Compounds Limited (BCL).

At all times relevant to this case, the State of Israel has owned at least some shares of the Dead Sea Companies' corporate parents. During a significant part of the period that respondents allege exposure to DBCP—from 1975 to 1985—the State of Israel owned all of the shares of Israel Chemicals Limited, which owned a large majority of the shares in Dead Sea Works Limited, which in turn owned a majority of the shares in DSB. See Dole Br. Add. 3a. During that same period, Dead Sea Works and DSB, individually or collectively, owned a large majority of the shares of BCL. *Id.* at 4a. In the 1990s, the State of Israel began to divest its interest in Israel Chemicals Limited. When this lawsuit was filed in 1997, the State of Israel owned approximately 32% of that company's shares, one of DSB's shares, and one of BCL's shares. See Dead Sea Br. 7.

The Dole petitioners and the Dead Sea Companies defended removal of this lawsuit to federal district court on three rationales. First, the Dole petitioners claimed that, under federal common law, federal jurisdiction exists as to any case raising important foreign relations concerns. Second, the Dead Sea Companies argued that each of them was an "organ of a foreign state," and therefore an "agency or instrumentality of a foreign state" within the meaning of 28 U.S.C. 1603(b)(2). Third, the Dead Sea Companies argued that Israel "owned" a majority of the Dead Sea Companies' "shares or other ownership interest" and that each was an "agency or instrumentality of a foreign state" on that basis. *Ibid.* The district court rejected petitioners' FSIA argu-

ments, Pet.-App. 33a-45a, but retained jurisdiction based on the federal common law of foreign relations, *id.* at 46a-49a. The district court then dismissed the lawsuit on *forum non conveniens* grounds. *Id.* at 51a-75a.

3. The court of appeals reversed and ordered that the case be remanded to Hawaii state court. The court rejected petitioners' claim that federal jurisdiction is appropriate because "this case implicates the 'uniquely federal' interest in foreign relations." Pet. App. 9a. It observed that state courts apply federal law in a wide variety of contexts, subject to this Court's review. *Id.* at 12a. The court of appeals found "no reason to treat the federal common law of foreign relations any differently," noting that Congress has not "extend[ed] federal-question jurisdiction to all suits where the federal common law of foreign relations might arise as an issue." *Id.* at 12a-13a.

The court of appeals also found no basis for federal jurisdiction under the FSIA's provision that defines an agency or instrumentality of a foreign state to include an "organ of a foreign state." 28 U.S.C. 1603(b)(2). "In defining whether an entity is an organ, courts consider whether the entity engages in a public activity on behalf of the foreign government." Pet. App. 21a. Here, the court explained, "[a]lthough Israeli law granted [substantial oversight authority] directly to the Israeli government, it is not considerably different from the control a majority shareholder would enjoy under American corporate law. * * * [T]he Dead Sea Companies were not run by government appointees; their employees were not treated as civil servants; nor were the Companies wholly owned by the government of Israel. * * * Nor did the Companies exercise any regulatory authority." *Id.* at 22a. The court therefore determined that the Dead Sea Companies are not entitled to organ status because they are "independent commercial enterprises, heavily regulated, but

acting to maximize profits rather than pursue public objectives." *Id.* at 22a-23a.

Of direct relevance here, the court of appeals concluded that Israel did not own a "majority of [the] shares or other ownership interest" in the Dead Sea Companies. 28 U.S.C. 1603(b)(2). The court initially questioned whether the FSIA applies to a corporation in which a foreign state no longer owns the majority of the shares at the time the lawsuit is filed. Pet. App. 16a-19a. But the court "assume[d]" for purposes of this case that "the FSIA would grant federal jurisdiction over an entity that at the time of the tortious conduct was—but no longer is—a government instrumentality." *Id.* at 19a. The court of appeals then concluded, based on its earlier decision in *Gates* v. *Victor Fine Foods*, 54 F.3d 1457 (9th Cir.), cert. denied, 516 U.S. 869 (1995), that the Dead Sea Companies were not instrumentalities of a foreign state. *Gates* held that the FSIA's definition of an instrumentality includes a corporation whose shares are actually owned by a foreign state, but does not include the subsidiaries of that corporation. See Pet. App. 19a. The court of appeals concluded that *Gates*' reasoning controls this case because, although Israel owned a majority of shares of Israel Chemicals Limited, Israel did not itself own a majority of the shares of that company's subsidiaries. *Id.* at 19a-21a.

SUMMARY OF ARGUMENT

I. The Dead Sea Companies are not agencies or instrumentalities of a foreign state within the meaning of the FSIA because neither company is a corporation "a majority of whose shares or other ownership interest is owned by a foreign state." 28 U.S.C. 1603(b)(2). A foreign state owns a majority of the shares of a corporation only if the foreign state itself actually owns those shares. A foreign state's ownership of a majority of shares of a parent corporation that in turn owns the shares in question will not suffice. Under "bedrock" principles of corporate law, the foreign

state, the parent corporation, and its subsidiary are separate entities. The foreign state's ownership of the parent corporation's shares may give it effective control over the parent corporation and its subsidiary, but the foreign state does not, as a matter of law, own the parent corporation's shares of the subsidiary. Journalists, lawyers, and even courts might sometimes colloquially describe the owner of a corporation as the owner of a corporate subsidiary. But the FSIA is a law, not a manner of speaking, and it accordingly should be interpreted in light of the legal meaning of its terms. When Congress wishes a statute to sweep more broadly than the legal meaning of ownership would reach, it expresses that intent through appropriate terminology.

The FSIA's purpose and legislative history provide no basis for courts to depart from the plain meaning of the words that Congress chose. The FSIA's ownership requirement, read in light of its legal meaning, poses little risk of serious foreign relations friction because it provides foreign states with a more generous measure of protection than other nations typically provide. If this Court nevertheless were to expand the coverage of the FSIA beyond the limits that the separate entity principle establishes, the Court would also need to create a new rule, without congressional guidance, for determining how far to extend the concept of "indirect" ownership that petitioners urge. The FSIA's legislative history provides no suggestion that Congress intended that course. Nor, contrary to petitioners' assertions, did Congress manifest any intention to grant immunities to foreign states comparable to those possessed by domestic government-owned corporations, which in any event frequently have no sovereign immunity.

II. Under any view of the FSIA's "ownership" requirement, the State of Israel did not own a majority of the shares of the Dead Sea Companies at the time this suit was filed. A foreign state owns a majority of the shares of a corporation

for purposes of satisfying the FSIA's threshold requirement for subject matter jurisdiction only if it owns those shares at the time of the lawsuit. The FSIA expressly requires present ownership, and, because the relevant provisions establish a condition for jurisdiction, a corporation must establish that it satisfies the FSIA's ownership requirement at the time that the lawsuit is filed. Congress had no compelling reason to make available the FSIA's special procedural provisions governing an "agency or instrumentality of a foreign state" to a corporation that no longer possesses the sovereign attribute—majority ownership by a foreign state—that distinguishes that entity from other corporations.

Contrary to petitioners' contentions, this Court's recognition of domestic immunities that protect the President, legislators, judges, and others, from suits arising from their "official acts," provides no basis for a different result. Unlike foreign sovereign immunity, those domestic immunities are not the product of the express terms of a jurisdictional statute, and they implicate entirely different policies and concerns. Petitioners' reliance on *The Western Maid*, 257 U.S. 419 (1922), an 80-year-old admiralty decision, is similarly misplaced. The Court's conclusion in that case, that Congress's retention of federal maritime immunity precluded the creation of a private in rem cause of action against vessels once they passed into private hands, likewise implicates different legal principles, policies, and concerns. Finally, petitioners are wrong in suggesting that the FSIA's goal of avoiding foreign friction provides a basis for departing from the FSIA's terms. A foreign state's attenuated interest in a corporation that it formerly owned does not provide a sufficient basis for disregarding the FSIA's text and treating the corporation as if it retained the status that the foreign state itself has terminated.

ARGUMENT

THE DEAD SEA COMPANIES ARE NOT AGENCIES OR INSTRUMENTALITIES OF A FOREIGN STATE FOR PURPOSES OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

The FSIA provides that a corporation is an "agency or instrumentality of a foreign state" if, among other requirements, "a majority of [the corporation's] shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. 1603(b). Petitioners urge that the Dead Sea Companies—DSB and BCL—each qualify as an "agency or instrumentality" because the State of Israel, before the initiation of this suit, had an indirect interest in those companies. Specifically, from 1975 to 1985, Israel owned a majority of the shares of Israel Chemicals Limited, which in turn owned a majority of the shares of Dead Sea Works, which in turn owned a majority of shares of DSB, which in turn owned a majority of the shares of BCL. Contrary to petitioners' submission, Israel's interest is too attenuated to satisfy the FSIA's definition, which requires that the foreign state itself own a majority of DSB's or BCL's shares. Israel has never actually owned a majority of the shares of either of the Dead Sea Companies. But in any event, Israel's past ownership of a majority of the shares of even the parent corporations of DSB and BCL terminated before the initiation of this suit. That past ownership interest does not provide a continuing basis for treating either DSB or BCL as "an agency or instrumentality of a foreign state"—and hence as a "foreign state" in its own right under the FSIA—that could remove this suit to federal court.

I. A Foreign State's Ownership Of A Majority Of The Shares Of A Corporate Entity Does Not Confer "Agency Or Instrumentality" Status On The Subsidiaries Of That Entity

A. The Plain Terms Of The FSIA's Majority Ownership Provision Embrace Only Those Entities The Majority Of Whose Shares Or Other Ownership Interest Is Actually Owned *By The Foreign State*

The "starting point for interpreting a statute is the language of the statute itself." *E.g.*, *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 25 (1989). The key language of the FSIA is contained in Section 1603(b)(2), which confers "agency or instrumentality status" on a corporation "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. 1603(b)(2). Under the familiar legal concept that a parent corporation and its subsidiaries are separate entities, a foreign state "owns" a majority of the shares of a corporation only if the foreign state itself actually owns those shares.

1. As this Court has recognized, "incorporation's basic purpose is to create a distinct legal entity." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001). Thus, when a foreign state creates a corporation, the law recognizes that the foreign state and the corporation are, as a matter of law, separate persons. See *First Nat'l City Bank* v. *Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 626-627 (1983) ("[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."). Likewise, when that corporation creates a subsidiary, "the parent corporation and its subsidiary are treated as separate and distinct legal persons even though the parent owns all the shares in the subsidiary and the two enterprises have identical directors and officers." Harry Henn & John Alexander, *Laws of Corporations* § 148, at 355 (1983) (Henn &

Alexander). See *Burnet* v. *Clark*, 287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entities.").[2]

The foreign state's ownership of the parent corporation's shares may enable it to control that corporation's activities, and the parent corporation's ownership of the subsidiary may enable it to control the subsidiary's activities. See, *e.g.*, *United States* v. *Bestfoods*, 524 U.S. 51, 61-62 (1998) (a "parent corporation" exercises "control through ownership of [the subsidiary] corporation's stock"). The combined effect of such a tiered arrangement may enable the foreign state to exercise effective control over the subsidiary. Nevertheless, the foreign state does not, in the legal sense, *own* the shares of the subsidiary. Rather, it is the parent corporation that owns those shares as one of its corporate

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[2] Petitioners incorrectly contend that "the FSIA explicitly rejects the principle of corporate separation in the definition of an agency or instrumentality." Dole Br. 34. Section 1603(b) expressly grants the FSIA's protections to certain categories of "separate legal person[s]"—those that are "organ[s]" of the foreign state and those that satisfy the majority ownership requirement. See 28 U.S.C. 1603(b)(1)-(2). Thus, by its very terms, Section 1603(b) of the FSIA recognizes and employs the separate entity concept. The FSIA's provision for attachment remedies, 28 U.S.C. 1610, further illustrates that Congress was aware of principles of separate corporate ownership. That provision separately addresses attachment of the "property * * * of a foreign state" generally, 28 U.S.C. 1610(a), and the "property * * * of an agency or instrumentality of a foreign state" in particular, 28 U.S.C. 1610(b). It limits attachment of the latter type of property to situations involving claims against the particular agency or instrumentality that owns it. 28 U.S.C. 1610(b)(2). As a result, "Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary." H.R. Rep. No. 1487, *supra*, at 29-30 (citation omitted).

assets. See, *e.g.*, 1 *Fletcher Cyclopedia of the Law of Private Corporations* § 31, at 509 (rev. perm. ed. 1999) (*Fletcher*) ("The property of the corporation is its property, and not that of the shareholders, as owners." (footnote omitted)); accord Henn & Alexander § 71, at 128-129 ("Shareholders are neither agents of the corporation * * * nor owners of the corporation's assets.").[3]

2. Petitioners primarily argue that a foreign state's ownership of the parent corporation should be equated with ownership of the parent corporation's assets because "[i]n *common parlance*, the shareholders of a corporation are frequently said to own the assets of the corporation, including the subsidiaries." Dole Br. 16 (emphasis added). See *Flink* v. *Paladini*, 279 U.S. 59, 63 (1929)(Holmes, J.) ("In common speech, the stockholders [of a corporation that

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[3] Petitioners disregard the extensive authority supporting that fundamental principle. See, *e.g.*, 1 *Fletcher* § 31, at 509-515 (collecting cases). They instead refer (Dole Br. 16; Dead Sea Br. 23) to a passage of the *Fletcher* treatise stating that "[t]he holding company *may be regarded* as the 'owner' of the subsidiary's property." 1 *Fletcher* § 43, at 733-734 (emphasis added). But the treatise emphasizes that "such results do not follow from the mere fact of stockholding." *Id.* at 734. Rather, a court may impute ownership to the holding company where the corporate form is a sham and properly disregarded. See *id.* at 733-734; see also, *e.g.*, 12B *Fletcher* § 5753, at 62 ("A parent corporation does not own the property of a subsidiary corporation, although under some circumstances it may be deemed to be the owner where it is proper to disregard the corporate entity.") (footnotes omitted); 6A *Fletcher* § 2821, at 334 ("A 'holding company' has a separate corporate existence, and is to be treated as a separate entity, unless such corporate existence is a mere sham.") (citing, *e.g.*, *Gledhill* v. *Fisher & Co.*, 262 N.W. 371, 373 (Mich. 1935) ("A stockholder in a corporation that owns another is not a stockholder in the latter.")); 1 *Fletcher* § 31, at 518 ("Under certain circumstances, * * * the corporate entity and ownership may be disregarded and the shareholder or shareholders regarded as owners; but this concedes the general rules to be as just stated."); U.S. Pet. Amicus Br. 8 n.3. No such sham or comparable circumstances are alleged here.

owned a ship] would be called owners [of the ship], recognizing that their pecuniary interest did not differ substantially from those who held shares in the ship."). The FSIA, however, is not "common parlance," but rather a law that should be interpreted in light of the legal meaning of the terms that Congress used. "Words that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning." *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 615 (2001) (Scalia, J., concurring); accord *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 613 (1992).[4]

A foreign state does not, by owning the majority of shares of a corporation, own the assets of that corporation—including that corporation's shares in a subsidiary—because the legal concept of ownership connotes basic rights to use and transfer property that the shareholders of a corporation generally do not possess. See, *e.g.*, *Black's Law Dictionary* 1131 (7th ed. 1999) ("Ownership implies the right to possess a thing, regardless of any actual or constructive control."). "Shareholders, even the controlling shareholder, cannot * * * assign the corporation's properties and rights, nor apply corporate funds to personal debts or objects, nor release a purchaser's liability to pay the price to the corporation, nor execute a bill of sale covering corporate assets." 1 *Fletcher* § 31, at 515 (footnotes omitted) (collecting cases); see 12B *Fletcher* § 5753, at 62 ("Ordinarily a shareholder cannot convey or mortgage the corporate property or transfer its goodwill or release a debt due to it."). Indeed, shareholders generally no more own corporate assets than they are liable for corporate debts. Cf. 1 *Fletcher* § 43, at 715-716 ("[U]nder ordinary circumstances, a parent corporation will

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[4] See, *e.g.*, *Field* v. *Mans*, 516 U.S. 59, 69-70 (1995); *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).

not be liable for the obligations of its subsidiary.") (collecting cases).

3. Congress's understanding that a foreign state's ownership is to be measured by a legal standard, rather than a colloquial one, is confirmed by context. See, *e.g.*, *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) ("[T]he meaning of statutory language, plain or not, depends on context.") (citing *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)). Section 1603(b)(2) does not simply define an "agency or instrumentality" to include companies that a foreign state, in some colloquial sense, "owns." See Dole Br. 16-18 & nn.5-8. Rather, it defines that term as a corporation "a majority of whose *shares or other ownership interest* is *owned* by a foreign state." 28 U.S.C. 1603(b) (emphasis added). The statute's specific reference to the foreign state's ownership of "shares"—which consist of discrete, legally recognized, units of property—is most naturally understood to signify actual legal ownership of the corporation's stock rather than effective control through a tiered corporate structure.

If Congress had intended to allow the type of tiering that petitioners propose, Section 1603(b) could have easily been written to include within the definition of "agency or instrumentality" those entities "a majority of whose shares" is owned not only "by a foreign state or political subdivision thereof" but also *by another agency or instrumentality of the foreign state*. But Congress did not do so. See H.R. Rep. No. 1487, *supra*, at 15 ("Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality * * * *only if* a majority of the ownership interests (shares of stock or otherwise) is owned by a *foreign state or by a foreign state's political subdivision*." (emphasis added)). Although Congress recognized that the term "political subdivision" should include "all governmental units beneath the central government, including local governments," *ibid.*, it made no similar

effort to include all tiered corporate entities beneath the corporation a majority of whose shares the foreign state or political subdivision itself owns.

To be sure, journalists, lawyers, and even courts sometimes say, as a shorthand expression, that a parent corporation "owns" stock held by a subsidiary, equating ownership with the control that may arise through the subsidiary form. See, *e.g.*, Dole Br. 17 nn.5-8. But when Congress enacts a law, it generally exercises greater care and explicitly so provides when it intends that law to embrace both a parent corporation and its subsidiaries. For example, the Newspaper Preservation Act's definition of "newspaper owner" includes "any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications." 15 U.S.C. 1802(3). Similarly explicit formulations of direct or indirect ownership or control appear throughout the United States Code. See, *e.g.*, *Barnhart* v. *Sigmon Coal Co.*, 122 S. Ct. 941, 951 (2002) (discussing coverage under the Coal Act of corporations in the same "controlled group" of corporations as mine operators).[5]

Contrary to petitioners' suggestion (Dole Br. 17 n.6), the Government Corporation Control Act of 1945, ch. 557, 59 Stat. 597, is not an exception to the rule. In the course of imposing heightened government oversight, Congress temporarily labeled forty-one government-controlled corporations as "wholly owned Government corporations," without regard to whether the listed entities were truly owned by

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[5] See also, *e.g.*, 7 U.S.C. 1a(8) (agricultural cooperative associations); 11 U.S.C. 101(2)(A) (bankruptcy affiliates); 12 U.S.C. 221a(b) (bank affiliates); 12 U.S.C. 1813(w)(4)(A) (bank subsidiaries); 12 U.S.C. 1841(a)(2)(A) (bank holding companies); 15 U.S.C. 79b(a)(7) (public holding companies); 15 U.S.C. 80a-2(a)(3)(A) (investment company affiliates); 22 U.S.C. 3102 (parent corporations in international survey). Such language clearly expresses Congress's intent to include more remote forms of affiliation. In contrast, Section 1603(b)(2) includes no reference to control, "direct or indirect" ownership, subsidiaries, or affiliates.

the government itself, or were, in fact, wholly owned subsidiaries of a wholly owned government corporation at the time—or, indeed, were corporations at all. See Act of June 30, 1945, ch. 215, 59 Stat. 310 (dissolving several entities that later appeared on the Government Corporation Control Act's list). In that instance, Congress elected to use a convenient shorthand term to describe a list of entities that were subject to the Act's terms. That shorthand term accurately described the status of most of the corporations, and there was no reason, for purposes of the Act, to distinguish corporations that were wholly owned subsidiaries of other wholly owned corporations. Congress's decision to employ an imprecise shorthand term that had no substantive consequence, in a particular instance more than 50 years ago, does not dictate the dramatic departure from convention that petitioners urge here. See generally 31 U.S.C. 9101 (providing a current definitional list of "wholly owned Government corporation[s]").[6]

4. This Court's recent decision in *United States* v. *Bestfoods* further confirms that the "separate entity" concept provides a "venerable common-law backdrop" for under-

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[6] Petitioners also rely (Dole Br. 18) on the General Accounting Office's use of similar shorthand in its *1945 Reference Manual of Government Corporations*, S. Doc. No. 86, 79th Cong., 1st Sess. (1945) (*GAO Manual*). In describing various corporate entities, the GAO sometimes referred to wholly-owned subsidiaries of wholly-owned government corporations as themselves government corporations. That usage similarly has no relevance to the issue presented here. The GAO's shorthand descriptions obviously cannot displace established understandings respecting the legal consequences of corporate form. Indeed, the *GAO Manual* also contains descriptions that accurately state the controlling concepts: "The [Warrior River Terminal] is wholly owned by the Inland Waterways Corporation, which in turn is owned by the United States." *GAO Manual* 290. That publication simply illustrates that, in the course of preparing a 526-page report, the GAO, for convenience, sometimes employed terminology that lacked legal precision.

standing the text of the FSIA. 524 U.S. at 62. In that case, the United States sought to recover its costs of responding to the release or threatened release of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, which authorizes recovery of environmental clean-up costs from "any person who * * * *owned* or operated" a polluting facility. 42 U.S.C. 9607 (emphasis added). As the Court noted:

> It is a general principle of corporate law deeply "ingrained in our economic and legal systems" that a parent corporation * * * is not liable for the acts of its subsidiaries. * * * The Government has indeed made no claim that a corporate parent is liable as an owner or operator under [42 U.S.C. 9607] simply because its subsidiary is subject to liability for owning or operating a polluting facility.

524 U.S. at 61-62. If the United States had subscribed to petitioners' view that a parent corporation "owns" the assets of its subsidiaries, it plainly would have sought to hold a parent corporation liable as the "owner" of a subsidiary's polluting facility. Instead, the United States recognized that CERCLA, like the FSIA, reflects the bedrock principle that a parent corporation does not "own" the assets of its subsidiary.[7]

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[7] Petitioners also claim that, even if Israel did not "own" the Dead Sea Companies' "shares," it owned "a majority of" those companies' "other ownership interest." Dole Br. 21-23; Dead Sea Br. 25-28. Unlike some partnerships and joint ventures, however, the ownership interest in the Dead Sea Companies *was divided into shares*. Thus, there is no "other ownership interest" of the Dead Sea Companies at issue in this case. Cf. 11 *Fletcher* § 5081, at 35 ("Most state corporations codes as well as the Model Business Corporation Acts define 'shares' as 'the units into which the proprietary interests in a corporation are divided.'"). A different approach to ownership of "shares or other ownership interests" might be

B. Petitioners' Extra-Textual Arguments Are Unpersuasive

Petitioners contend that their construction of Section 1603(b) finds support in (1) the FSIA's goal of protecting foreign relations; (2) the FSIA's legislative history; and (3) the historical treatment of companies indirectly owned by the federal government. Those arguments are without merit.

1. Petitioners contend that their construction advances the FSIA's "primary" purpose of "minimiz[ing] the foreign relations problems that can arise from litigation involving foreign governments and affiliated entities." Dole Br. 12; see *id.* at 23-28; Dead Sea Br. 31-36. Congress made clear in its declaration of purpose, however, that the FSIA seeks to "protect the rights of both foreign states *and* litigants in United States courts." 28 U.S.C. 1602 (emphasis added). The FSIA should be construed with that balance in mind. Congress crafted Section 1603(b) to give proper respect to the competing interests of both foreign states and other litigants in United States courts.[8]

Moreover, Section 1603(b), construed in accordance with the "separate entity" principle, protects the interests of foreign states by granting them a *more generous* measure of protection than foreign states typically grant to foreign-government-owned corporations. By and large, foreign

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appropriate if the entity in question were organized under a legal system whose ownership principles do not resemble our own. See Gary Born & David Westin, *International Civil Litigation in United States Courts* 458-459 (2d ed. 1992) (collecting cases and commentary). But this is not such a case. The mere fact that Israel exercises substantial *control* over its government companies and subsidiaries (Dead Sea Br. 30 & n.11) does not indicate a different concept of corporate *ownership*.

[8] Cf. *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 646 (1990) ("[N]o legislation pursues its purposes at all costs * * * and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.").

states do *not* grant sovereign-immunity-based protections of any kind to government-owned corporations unless the corporations are engaged in sovereign acts. See Gary Born & David Westin, *International Civil Litigation in United States Courts* 459 & nn.57-58 (2d ed. 1992).[9] Section 1603(b) similarly confers "agency or instrumentality" status on corporations engaged in sovereign acts through its provision extending that status to an "organ of a foreign state." 28 U.S.C. 1603(b)(2). *In addition*, Section 1603(b) confers that status—and the accompanying procedural protections—on corporations the majority of whose shares are actually owned by a foreign state, *whether or not* those corporations perform sovereign functions. *Ibid.* Thus, Section 1603(b), even when construed in light of "separate entity" principles, provides broader protection to the sovereign interests of foreign states than other nations ordinarily provide. Consequently, it is unlikely, as so construed, to give rise to "irritations in foreign relations" (Dole Br. 24). Israel, for example, has not joined petitioners in raising objections to the court of appeals' ruling in this case.[10]

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[9] See also, *e.g.*, William Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tulane L. Rev. 535 (1991); cf. Dole Br. 36 & n.15.

[10] Although petitioners raise the specter of "foreign relations problems," Dole Br. 12, only one foreign state, the Republic of Ireland, has filed a brief amicus curiae supporting petitioners, citing concerns respecting the treatment of an Irish insurance company that was acquired by a government-owned holding company. Ireland Amicus Br. 19. As noted in the text, however, that company can expect to receive treatment under the FSIA that is no less favorable than the treatment it would be accorded in most other countries. Petitioners' additional contention (Dole Br. 26-27; Dead Sea Br. 35) that application of the separate entity doctrine would lead to arbitrary results is mistaken, particularly when measured against a foreign state's expectations. The resulting rule would simply determine ownership in conformity with the normal consequences of separate incorporation. The only anomaly would be that a foreign state would receive a

Furthermore, Section 1603(b), construed in light of the "separate entity" principle, takes due account of the interests of other litigants. It places a reasonable limit on the extent to which the protections provided by the FSIA may be expanded through the corporate form, and it does so on the basis of clear and manageable rules that rest on familiar corporate law concepts. Individuals who do business wi... foreign corporations need such rules when determining whether they are dealing with entities that may be subject to the FSIA. Under the United States' understanding of Section 1603(b), the status of a foreign entity can be determined based on whether the entity engages in sovereign activities and on whether a majority of its stock is owned by a foreign state. Under petitioners' construction, the entity's status may be hidden behind a series of corporate shells that place considerable burdens on contracting parties and litigants—as well as the courts—in determining the true legal character of the entity.

This case illustrates the potentially complex inquiries that petitioners' construction would require. See Dole Br. Add. 3a-4a (charts depicting the complicated and constantly changing corporate relationships). Furthermore, if the Court were to adopt petitioners' approach, it would be required to create a rule, without any congressional guidance, for determining *how* to measure whether a foreign state owns a "majority" of the shares of a distantly tiered entity. Petitioners suggest that the Court could adopt either a "multiplier" rule (see Dole Br. 20, 38) or an "infinite tiering" rule (*id.* at 38 & n. 17). But whether the Court adopted one of those tests, or some other test, it would thrust itself into a policy-making function that does not ordinarily reside in the Judicial Branch. Congress, which

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benefit—the extension of FSIA protections to majority-owned corporations without regard to whether they perform sovereign acts—that generally has no analogue elsewhere in the world.

regularly fields recommendations for legislative reform, is far better situated to address issues of policy respecting the FSIA. Cf. Working Group of the American Bar Ass'n, *Reforming The Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489 (2002) (proposing legislative amendments, including amendments addressing tiered corporate relationships).

2. Petitioners' claim (Dole Br. 28-29) that the FSIA's legislative history supports their construction is baseless. The only evidence they cite (*id.* at 29) is the House Report's statement that a "mining enterprise" might qualify as an "agency or instrumentality." H.R. Rep. No. 1487, *supra*, at 15-16. Petitioners contend that the word "enterprise" necessarily denotes a multi-corporate undertaking, but plainly that is not so. See, *e.g. Webster's Third New International Dictionary* 757 (1993) (defining "enterprise" as, among other things, "a unit of economic organization or activity (as a factory, a farm, a mine); *esp.*: a business organization: FIRM, COMPANY"). The FSIA's legislative history does not discuss tiered corporate relationships. The legislative history does, however, recognize the significance and vitality of the separate entity principle. See note 2, *supra*.

3. Petitioners are wrong in suggesting that the FSIA's use of the term "owned" implicitly grants "companies indirectly owned by foreign governments the same agency-or-instrumentality status that companies indirectly owned by the federal government enjoy." Dole Br. 31. Congress did not manifest any intent to grant agencies or instrumentalities of foreign states a status equal to corporations owned by the United States. Rather, Congress made clear that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. 1602. See *Verlinden*, 461 U.S. at 486-489.

The FSIA, which "largely codifies the so-called restrictive theory of foreign sovereign immunity," *Weltover*, 504 U.S. at 612-613 (internal quotation marks omitted), implicates different policies than domestic sovereign immunity, and the criteria governing jurisdiction and immunity in each instance are correspondingly different. See *Verlinden*, 461 U.S. at 486 ("[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution."). Compare, *e.g.*, 28 U.S.C. 1605 (FSIA exceptions to immunity), with 28 U.S.C. 2674, 2680 (Federal Tort Claims Act exceptions to immunity); see also 28 U.S.C. 1606 (allowing punitive damages against an agency or instrumentality of a foreign state). Hence, no concrete insights into the nature of the entities covered by the FSIA can be gained by comparing the scope of foreign sovereign immunity to immunities granted in the domestic context.[11]

In sum, petitioners' reliance on extra-textual sources is unavailing. Neither the FSIA's purpose nor its history supports extending its protections to subsidiaries of a foreign state's majority-owned corporations, and domestic principles of sovereign immunity have no direct bearing on the matter.

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[11] Indeed, Congress has elected, in some respects, to grant foreign "agencies or instrumentalities" broader immunities than those that Congress provides to corporations owned by the United States. See, *e.g.*, *Loeffler* v. *Frank*, 486 U.S. 549, 554-555 (1988) (noting that Congress has frequently withheld sovereign immunity from federal entities, such as the United States Postal Service, through "sue and be sued" clauses).

II. The FSIA Does Not Apply To A Foreign Corporation If The Foreign State Does Not Own A Majority Of The Corporation's Shares At The Time Of The Lawsuit

A. The Plain Terms Of The FSIA Grant Protection To Those Entities That Satisfy The FSIA's Definitional Requirements At The Time Of Suit

Even if the Dead Sea Companies could be considered agencies or instrumentalities of Israel at the time that the alleged liability arose, they were not so in 1997, when respondents filed their suit, because Israel had sold its controlling interest in their corporate parents. Because the Dead Sea Companies were no longer "foreign states" under any conception of the FSIA's majority ownership requirement, they were not entitled to invoke the provision of the federal removal statute applicable to a "foreign state," 28 U.S.C. 1441(d).

1. The FSIA prescribes the extent to which a "foreign state," including an "agency or instrumentality," shall be subject to "the jurisdiction of the courts of the United States and of the States." 28 U.S.C. 1604; see 28 U.S.C. 1330, 1441(d), 1605-1607.[12] Because the FSIA is a jurisdictional statute, a corporation that seeks to invoke its provisions must establish that it qualifies as an "agency or instrumentality" at the time the action is filed. See *Freeport-McMoRAN Inc.* v. *K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (per curiam); see *Smith* v. *Sperling*, 354 U.S. 91, 93 n.1 (1957); *Anderson* v. *Watt*, 138 U.S. 694, 702-703 (1891). As Chief Justice Marshall explained nearly two centuries ago:

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[12] Chapter 97 of Title 28 (28 U.S.C. 1602-1611) is entitled "*Jurisdictional* Immunities of Foreign States" (emphasis added), and the corresponding provisions in 28 U.S.C. 1330 and 1441(d) govern the original and removal jurisdiction of the federal district courts over suits brought against foreign states.

> It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events.

Mollan v. *Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824); accord *Conolly* v. *Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829).

Congress drafted the FSIA's definitional provisions against the backdrop of that hornbook principle governing jurisdictional statutes. It unambiguously defined an "agency or instrumentality" to include a corporation "a majority of whose shares or other ownership interest *is* owned by a foreign state." 28 U.S.C. 1603(b)(2) (emphasis added). That definition clearly expresses the understanding that an entity qualifies as an "agency or instrumentality" based on the foreign state's current ownership of its shares and that the entity's status as an "agency or instrumentality" may be lost through the foreign state's divestiture of its ownership interest. The FSIA's express direction that an entity qualifies as an "agency or instrumentality" only if a majority of its shares currently "is owned" by a foreign state must be understood to require majority ownership at the time that is relevant for purposes of applying the particular provisions of the FSIA at issue—in this instance, the provisions governing the filing of suits in (or removal of suits to) federal district court.[13]

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[13] Petitioners note that, "[a]s a purely grammatical matter, the present tense can be used to express matters that do not refer specifically to the present but are general timeless statements." Dole Br. 40; see Dead Sea Br. 42 (internal quotation marks omitted). But whatever the general value of that statement in interpreting statutory provisions, including other provisions of the FSIA, Dole Br. 41-42, Dead Sea Br. 42-43, it is inapposite here. The FSIA explicitly circumscribes a party's invocation of judicial authority based on that party's satisfaction of a present condition—majority ownership by a foreign state. The satisfaction of that specific jurisdictional condition "is governed by that condition, as it was at the commencement of the suit." *Conolly*, 27 U.S. (2 Pet.) at 565; see

2. The FSIA's requirement that majority ownership must be demonstrated at the time of suit is no different in principle than the requirement that diversity of citizenship, or other jurisdictional requirements pertaining to the character of the lawsuit, must be demonstrated at that time. See, *e.g.*, 28 U.S.C. 1332. The fundamental question in each case is one of subject matter jurisdiction—whether the dispute is an appropriate one for a federal court to decide. Congress has quite sensibly determined that the scope of the federal court's subject matter jurisdiction over foreign states, including their agencies and instrumentalities, should depend on the status of the parties at the time of suit. Congress had no reason to make available the FSIA's special provisions governing an "agency or instrumentality" to a corporation that no longer possesses the sovereign attribute —ownership by a foreign state—that distinguishes that entity from other corporations.

B. Petitioners' Extra-Textual Arguments Are Unpersuasive

Petitioners dispute the significance of the plain text of the FSIA and the background rules for interpreting grants of subject matter jurisdiction. Dole Br. 40-42; Dead Sea Br. 41-43. Rather, in arguing that a former "agency or instrumentality" of a foreign state may invoke the FSIA's protections, petitioners rely primarily on (1) domestic immunity principles; (2) an 80-year-old in rem admiralty case; and (3) the purposes of the FSIA. Those sources do not support petitioners' position.

1. Petitioners would have the Court take guidance from cases, such as *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), in

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Mollan, 22 U.S. (9 Wheat.) at 539. In other situations, such as where application of an exception to foreign sovereign immunity depends on the nature of past conduct or events (see, *e.g.*, 28 U.S.C. 1605(a)(6) and (7)), a court may find that examination of the conditions at the time of the past conduct or events is appropriate.

which the Court has recognized that former government officials are entitled to immunity from liability for actions taken in their official capacity. See Dole Br. 44; Dead Sea Br. 46-47. Petitioners overlook that those cases do not involve congressional determinations respecting the scope of subject matter jurisdiction. Instead, those cases involve the distinct situation of "judicial recognition of immunity from suits *arising from official acts*." *Nixon*, 457 U.S. at 745 (emphasis added).

The Court explicitly held in *Nixon* that "petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts." 457 U.S. at 749. The Court did not derive that immunity from application of the express terms of a jurisdictional statute, but rather as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Ibid.* The other species of immunity that petitioners cite (Dole Br. 44), including legislative, judicial, and prosecutorial immunity, have similar functional underpinnings and are similarly inapposite to the case at hand. See *Nixon*, 457 U.S. at 748 (describing the development of those doctrines). Assuming that international law might provide a basis for claiming analogous functional immunities based on past conduct by a *non*-natural person that has lost its sovereign status, such as a former organ of a foreign state, petitioners do not claim that they engaged in any comparable official acts here.

2. Petitioners also place great stock (Dole Br. 43; Dead Sea Br. 46) in *The Western Maid*, 257 U.S. 419 (1922), an 80-year-old admiralty case. That decision is also inapposite. In *The Western Maid*, the Court addressed whether a federal court could entertain in rem admiralty actions against three ships on account of collisions that occurred while the ships were employed by the United States in wartime service.

Two were privately owned vessels that the government had temporarily chartered for military needs. The Court concluded that neither Section 9 of the Shipping Act, 1916, ch. 451, 39 Stat. 728, nor Section 4 of the Suits in Admiralty Act, ch. 95, 41 Stat. 525, nor any act predating those statutes, subjected the United States or the ships to liability for damages caused by the ships while they were in government service. 257 U.S. at 431. The Court also recognized, however, that general maritime law would subject a ship in private service to in rem liability if it caused a collision. It therefore addressed the question "whether a liability attached to the ships which although dormant while the United States was in possession became enforcible as soon as the vessels came into hands that could be sued." *Id.* at 432.

The Court rejected that theory of liability, noting that general maritime law has force only to the extent it has "been accepted and adopted by the United States." 257 U.S. at 432. The Court stated:

> The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so. If then we imagine the sovereign power announcing the system of its laws in a single voice it is hard to conceive it as declaring that while it does not recognize the possibility of its acts being a legal wrong and while its immunity from such an imputation of course extends to its property, * * * yet if that property passes into other hands, perhaps of an innocent purchaser, it may be seized upon a claim that had no existence before.

Id. at 433. Although expressed in somewhat archaic terms, the Court's ratio decidendi is clear. The Court concluded that, because the United States had declined to create a *cause of action* or *substantive liability* in tort for the collision while the vessel was in government service, the courts

should not recognize a general maritime in rem cause of action, arising out of the same incident, that would run against subsequent owners. That holding, which addresses whether the courts were justified in recognizing a maritime cause of action under the facts of that case, has no relevance to the question of subject matter jurisdiction presented here.[14]

3. Petitioners also contend that the FSIA's "goal of protecting foreign relations" supports extending the FSIA's protections to a corporation that once was, but is no longer, an "agency or instrumentality of a foreign state." Dole Br. 45-46; see Dead Sea Br. 43-45. The FSIA seeks to protect, however, the *present* sovereign interests of foreign states (including their agencies and instrumentalities) when they are subjected to suit in United States courts, and not to regulate questions of procedure and substantive liability respecting private corporations that once were, but no longer are, owned by foreign states. The FSIA left those questions to other sources of law. See, *e.g.*, *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp. Int'l*, 493 U.S. 400 (1990) (discussing act of state doctrine).

In any event, as previously noted, the FSIA, like other statutes, does not pursue a single objective to the exclusion of others, but instead strikes a balance between the competing interests of foreign states and other litigants. The foreign state's interests in a suit against a *former* majority-owned corporation are likely to be even more attenuated than the foreign state's interests in a current subsidiary of a majority-owned corporation. Those interests do not provide a sufficient basis for rejecting the clear import of the statutory text and treating the corporation as if it retained a former status that the foreign state itself has terminated.

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[14] As an historical note, "[t]he United States today would be subject to suit on the facts of *The Western Maid* under the Public Vessels Act." *Calmar S.S. Corp.* v. *United States*, 345 U.S. 446, 454 (1953).

If the foreign state has divested all of its stock in the entity, or reduced its ownership from a majority to a minority stake, by the time of suit, then the foreign state's interests generally would not be substantially different than would be the case if the foreign state had never acquired the stock, or never had more than a minority stake, in the corporation. The FSIA's protections are plainly not available in the latter context. There is no persuasive reason why the corporation should benefit from the FSIA's protections simply because the foreign state previously had, but no longer has, a majority ownership interest in the corporation.[15]

As the court of appeals correctly recognized, once a foreign state has eliminated its majority ownership interest in a corporation, any "affront" to the foreign state arising from litigation against that corporation is likely to be "remote and indirect." Pet. App. 19a. It would, moreover, not be the sort of affront to which the FSIA is addressed—namely, that which may arise as a result of subjecting a foreign sovereign, as such, to the jurisdiction of United States courts without suitable protections. Indeed, despite petitioners' predictions that such litigation will cause "affronts to foreign sovereigns," Dole Br. 47, the United States has not encountered "diplomatic friction" arising from post-privatization litigation.[16]

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[15] A foreign state has a general interest, of course, in fair treatment of its citizens or subjects, including its corporations, in the courts of other nations. But the United States provides substantial protections to those foreign citizens or subjects apart from the FSIA. Significantly, one of the FSIA's most important procedural protections—access to a federal forum—will often be available to a newly privatized corporation through the provision of foreign diversity jurisdiction. See 28 U.S.C. 1441(a); see generally *JPMorgan Chase Bank* v. *Traffic Stream (BVI) Infrastructure Ltd.*, 122 S. Ct. 2054 (2002).

[16] It is conceivable that a foreign state could be concerned that a newly private corporation may potentially face liabilities for past conduct during the period of foreign state ownership. But as petitioners themselves rec-

At bottom, if this Court were to accept petitioners' view that former majority-owned corporations are entitled to invoke the FSIA, the primary consequence may be simply to encourage private corporations that are no longer "agencies or instrumentalities" of a foreign state to seek strategic advantage in litigation (here, a federal rule of *forum non conveniens* that has no relation to the policies of the FSIA) by demanding the special procedures that the FSIA reserves for foreign sovereigns themselves. That consequence would undermine Congress's basic goal of providing foreign states with a measure of immunity that "would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. 1602.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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ognize, majority-owned corporations that engage in commercial activities are likely to be subject to liability for their activities in the United States under the FSIA's commercial activity exception. For those organizations, privatization will not result in new liabilities. See Dole Br. 28, 47. To the extent that new potential liabilities truly exist and would not expire through the application of statutes of limitation or be barred by substantive rules of liability, the foreign state can conceivably address the potential financial burdens in the course of privatization using mechanisms, such as insurance, that enterprises routinely employ when they anticipate the possibility of new liabilities. If the foreign state fails to address those liabilities, they will likely be reflected in the price that private purchasers are willing pay to acquire the corporation.

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IN THE

Supreme Court of the United States

DOLE FOOD COMPANY, *et al.*,
Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,
Respondents.

DEAD SEA BROMINE CO. LTD., *et. al.*,
Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,
Respondents.

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ARGUMENT

I. THE MAJORITY OWNERSHIP REQUIREMENT IS SATISFIED BY INDIRECT OWNERSHIP

The Dole Petitioners identified four compelling reasons in their opening brief why the FSIA's majority ownership requirement should be interpreted to encompass indirect ownership:

1. the language of both the "shares" and "ownership interest" prongs of the requirement is naturally read to encompass indirect ownership (Dole Br. 15-23);
2. because foreign governments have both political and economic reasons to organize important state-owned enterprises into tiered structures, this reading furthers one of the primary objectives of the FSIA: protecting against foreign relations problems by, among other things, channeling suits in which foreign governments are specially interested into federal court (*id.* at 23-25);
3. a distinction between direct and indirect ownership would protect companies that foreign governments directly own by a bare majority (say, 51%) while leaving unprotected companies that foreign governments indirectly own wholly (100%) through a tiered structure even though the United States has no legitimate interest in whether foreign governments use tiered structures (*id.* at 26-27); and
4. companies indirectly owned by foreign states would benefit primarily from procedural protections such as a federal forum rather than immunity from suit (*id.* at 27-28).

Neither respondents nor their *amicus curiae*, the United States Government, seriously challenge these points. In fact, the Government concedes (Gov't Merits Br. 7, 11) that foreign states exercise effective control over companies they indirectly own through tiered structures. Nevertheless, respondents and the Government urge this Court to read the majority ownership requirement to be limited to direct ownership based upon the

"legal" meaning of ownership and the principle that corporations and their subsidiaries are separate legal entities. These arid, formalistic arguments are unpersuasive. Indeed, both respondents and the Government fail to offer any plausible reason why Congress would have distinguished between direct and indirect ownership in the majority ownership requirement.[1]

A. The Concept of Ownership Does Not Have a Settled Technical Meaning

Petitioners demonstrated in their opening brief (Dole Br. 16-20 & nn.5-11) that legislation, government reports, newspaper articles, and opinions of the Court frequently describe corporate shareholders as owners of the assets of the corporation and its subsidiaries. Although respondents and the Government attempt to dismiss this usage as "imprecise shorthand term[s]," "[c]olloquialisms and newspaper reports," Resp. Br. 15; Gov't Merits Br. 7, 16, neither seriously disputes that in "common parlance" (Gov't Merits Br. 12-13) the majority shareholder in a corporation is said to "own" the shares of the corporation's subsidiaries. Instead, they argue that the concept of ownership should be treated as a term of art and read according to its "legal meaning." Resp. Br. 14; Gov't Merits Br. 10-14. This argument is without merit.

1. The word "ownership" is not a term of art. A word qualifies as a term of art only if it has an "accumulated settled meaning." *Field v. Mans*, 516 U.S. 59, 69 (1995) (quotations omitted). As the opening brief pointed out (Dole Br. 33), this Court recognized long ago that "ownership" is an "untechnical"

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[1] Respondents also assert (Resp. Br. 6) that the Dead Sea companies did not offer evidence of respondents' exposure to DBCP produced by the companies. In fact, however, the *Dole Petitioners* did submit such evidence. *See* Def. Joint Mem. in Opp. to Remand, Ex. 18 ¶¶ 8-11 (noting purchase of Dead Sea Bromine's Nemabrom in 1977 for use, *inter alia*, in Costa Rica); *id.*, Ex. 27 (noting sales in Costa Rica); *see also Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1343 n.35 (S. D. Tex. 1995) (finding "evidence of use of Israeli DBCP" by the Dole Petitioners), *aff'd*, 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001).

concept, *Flink v. Paladini*, 279 U.S. 59, 63 (1929) (Holmes, J.), and neither respondents nor the Government have shown otherwise. Respondents' only authority (Resp. Br. 14 & n.5) does not even discuss the concept of ownership, *see* Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 Conn. L. Rev. 295 (1996), and the Government's authority (Gov't Merits Br. 16), the most recent edition of *Black's Law Dictionary*, simply defines the term without suggesting any settled technical meaning. Even more importantly, the 1979 version of the dictionary—which is more contemporaneous to the enactment of the FSIA and therefore more revealing of the congressional intent underlying it (*see, e.g.*, *MCI Telecommunications Corp. v. Am. Tel. & Tel.*, 512 U.S. 218, 228 (1994))—describes the word "owner" as a "*nomen generalissimum*," a general term that does not have a settled technical meaning. *Black's Law Dictionary* 996 (5th ed. 1979); *see also id.* at 945 (defining "*nomen generalissimum*" to mean a "name of the most general kind" or "general meaning"). Thus, respondents and the Government have not even begun to establish that ownership is a legal term of art.

Even worse, respondents and the Government fail to reconcile their legal meaning argument with actual congressional usage. For example, in *Flink v. Paladini*, this Court construed a maritime statute referring to "owners of a[ny] vessels," 46 U.S.C. app. §§ 183, 189, to include the shareholders of a corporation holding title to a ship because "[i]n common speech the stockholders would be called owners." 279 U.S. at 63. Similarly, in *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), the Court construed a trademark statute, 19 U.S.C. § 1526(a), to treat a foreign corporation as the owner of a trademark registered to its American subsidiary. 486 U.S. at 292 (Kennedy, J.); *id.* at 298-99 (Brennan, J.); *id.* at 318-19 (Scalia, J.). And in the Government Corporation Control Act, Congress described several subsidiaries of the Reconstruction Finance Corporation as "wholly owned Government corporation[s]." 59 Stat. 597, 597-98 (1945). The claim that the concept of ownership has a

fixed "legal" meaning excluding indirect ownership cannot be reconciled with these statutes.

2. Respondents and the Government also claim (Resp. Br. 14-16 & n.6; Gov't Merits Br. 15 n.5) that Congress could have used more precise language to include indirect ownership within the majority ownership requirement. It is, however, equally true that Congress could have precisely limited the requirement to direct ownership of shares. *See, e.g.*, 20 U.S.C. § 1087-3(a) (referring to "common shares ... *directly owned* by a Holding Company") (emphasis added); 26 U.S.C. § 165(g)(3)(A) (requiring that "the taxpayer *owns directly* stock" in a corporation) (emphasis added); *id.* § 851(c)(3)(A) ("stock ... *owned directly* by one or more of the corporations") (emphasis added); *id.* § 993(3)(1)(A) (referring to "stock ... *owned directly* by the domestic corporation") (emphasis added); *id.* § 1083 (referring to "stock ... *owned directly* by one or more of the other corporations") (emphasis added). Thus, while respondents are "correct in noting that Congress has the skills to be precise, the fact that it did not employ those skills here helps [the Court] not at all." *Scarborough v. United States*, 431 U.S. 563, 570-71 (1977).

3. In all events, respondents' legal meaning argument does not affect petitioners' interpretation of the majority ownership requirement's "ownership interest" prong. As previously demonstrated (Dole Br. 21-22), "interest" is the most general term than can be used to describe a legal right, and it has been repeatedly used by the Court to describe the rights of corporate shareholders in a corporation's property. *See, e.g., Kaufman v. Société Internationale pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156 (1952). In fact, petitioners showed that "it is hornbook law that '[s]hares of stock ... represent a beneficial interest in the corporate property.'" Dole Br. 22 (quoting 11 *Fletcher's Cyclopedia of the Law of Private Corporations* § 5100, at 93 (perm. rev. vol. 1999)). Thus, the "legal" meaning of the word "interest" supports petitioners' conclusion that the "ownership interest" prong

encompasses the rights of a corporate shareholder in the corporation's subsidiaries.

Unable to offer any alternative reading of the language of the "ownership interest" prong, respondents contend that this language must be interpreted to exclude a corporate shareholder's interest in corporate subsidiaries in order to avoid rendering the majority ownership requirement's prior reference to "shares" superfluous. Resp. Br. 20-21. Petitioners have, however, already identified the flaw in this argument: under the principle of *ejusdem generis* the specific term "shares" defines the class covered by the general term "other ownership interest." Dole Br. 32-33 (citing 2A Norman J. Singer, *Statutes & Statutory Construction* § 47:17, at 285 (6th ed. 2000)). Respondents object that the class derived by petitioners—ownership interests that confer the same measure of control as holding title to a majority of shares (Dole Br. 22-23)—introduces the concept of control into the statute. Resp. Br. 22. In fact, it simply identifies the animating purpose of the majority ownership requirement, as the *ejusdem generis* principle demands. *See* 2A Singer, *supra*, § 47:18, at 289. While respondents also invoke the *ejusdem generis* principle, Resp. Br. 21, notably absent from their brief is any attempt to reconcile the vague and question-begging class they suggest—the "functional equivalents" of stock (*id.*)—with the subject and purpose of the FSIA.

Although the Government no longer ignores the ownership interest prong, its treatment of that provision remains submerged, albeit now in a footnote rather than an ellipsis. Gov't Merits Br. 17 n.7; *see also* Dole Br. 34. The Government asserts there that the "ownership interest" prong is inapplicable because the Dead Sea companies issued shares. This, of course, assumes that the majority ownership requirement's references to "shares" and "other ownership interest" are mutually exclusive—which, as previously shown, they are not (Dole Br. 32-33)—and thereby begs the question of what the "other ownership interest" prong means.

B. The Separate Entity Principle Is Inapplicable

Respondents and the Government also rely on the supposedly "bedrock principle" that "the parent corporation[] and its subsidiaries are separate entities." Resp. Br. 16-19; Gov't Merits Br. 6-7, 10-11. They do not, however, explain how this principle applies to the "ownership interest" prong or why it requires that any ownership of "shares" be direct. In any event, as petitioners have already demonstrated (Dole Br. 34-35), the separate entity principle is inapplicable here because the FSIA's definition of agencies or instrumentalities explicitly rejects it and because application of the principle would undermine the FSIA's goal of protecting foreign relations.

1. The FSIA Explicitly Rejects the Separate Entity Principle

Although respondents concede that the FSIA rejects the "separate entity rule" under which companies owned by foreign governments were denied foreign sovereign immunity, they argue that Congress did not mean "to ignore the formalities of corporate law or the distinctions among different entities." Resp. Br. 36. At least with respect to the Act's definition of agency or instrumentality, that is plainly incorrect. Under the formalities of corporate law invoked by respondents, "'[a] corporation and its stockholders are generally to be treated as separate entities.'" *Id.* at 16 (quoting *Burnet v. Clark*, 287 U.S. 410, 415 (1932)). The FSIA does not, however, treat corporations and governments owning a majority of their stock separately. To the contrary, it defines such corporations to be "foreign states." *See* 28 U.S.C. § 1603(b) (defining corporations majority owned by their states of incorporation to be agencies or instrumentalities of those states); *id.* § 1603(a) (defining "foreign state" to include any "agency or instrumentality of a foreign state"). Thus, in the pertinent provisions the FSIA clearly rejects the formalistic corporate law principles invoked by respondents.[2]

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[2] Respondents' attempt to distinguish the "separate entity rule" from the corporate law principles they invoke (Resp. Br. 36) is equally untenable: as

This Court's decisions in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), and *United States v. Bestfoods*, 524 U.S. 51 (1998), do not suggest that the separate entity principle applies here. Contrary to the Government's contention (Gov't Merits Br. 17), the *Bestfoods* decision did not apply the principle "that a parent corporation does not 'own' the assets of its subsidiary"; it applied the narrower (and far more accepted) principle that "a parent corporation . . . is not liable for the acts of its subsidiaries." 524 U.S. at 61; *see also* Phillip I. Blumberg & Karen Wackerman, *The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations* xi (Supp. 2002) ("Where substantive liability is not involved," the separate entity principle is "beginning to collapse."). Similarly, the *First National City Bank* decision observed only that agencies and instrumentalities of foreign governments are legally distinct from those governments for purposes of determining liability. *See* 462 U.S. at 626-28; *see also id.* at 621 (holding the FSIA inapplicable to questions of vicarious liability). Moreover, far from endorsing the separate entity principle, the decision cautioned that the "'problem of the relation between parent and subsidiary corporations'" should not be "'enveloped in the mists of metaphor.'" *Id.* (quoting *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 58 (N.Y. 1926) (Cardozo, J.)).

2. Application of the Separate Entity Principle Would Frustrate the Congressional Policies Underlying the Majority Ownership Requirement

As previously demonstrated (Dole Br. 26-27, 35), application of the separate entity principle would also conflict with the

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respondents' own authority recognizes, the separate entity rule was based upon the principle that "a corporation has a legal personality distinct from its shareholders." William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 542-43 (1991).

FSIA's objective of protecting foreign relations. The attempts of respondents and the Government to dispute these arguments are unpersuasive and, in many instances, incompatible with the policies underlying the Act.

1. Relying on a report from the Working Group on the FSIA formed by the American Bar Association, respondents contend that "'a foreign state's sovereign interest in a lower tier corporation is far more likely to be significantly less than in a corporation directly owned.'" Resp. Br. 35 (quoting ABA Working Group, *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, 524 (2002)). What respondents fail to disclose, however, is that the Working Group concluded that tiered entities *should* enjoy the protections of the FSIA because "*[t]he strength of a foreign state's sovereign interests in an area does not necessarily dissipate when it employs more complicated legal structures resembling those used by modern private businesses.*" ABA Working Group, *supra*, at 522 (emphasis added). As petitioners demonstrated (Dole Br. 25), foreign governments often have powerful political and economic reasons for using tiered structures. The Working Group made the same point, observing that "some states utilize a tiered corporate structure to manage and control important areas of national interest, such as natural resources." ABA Working Group, *supra*, at 522 (discussing the Mexican petroleum enterprise and the Honduran lumber industry). As a consequence, it is clear that in many instances foreign governments will be gravely concerned about the treatment of companies indirectly owned (and therefore controlled) by them.

In the alternative, respondents and the Government argue that foreign governments have little concern over the treatment of their indirectly owned companies in American courts because other countries do not afford such companies any sovereign-immunity-based protections. Resp. Br. 34-35; Gov't Merits Br. 18-20. There is, however, no reason to think that foreign governments will sit by blithely while companies entrusted with key state interests are discriminated against in American state courts. Moreover, the Congress that passed the FSIA (and the

Administration that proposed it) certainly did not think so. As the Government acknowledges (Gov't Merits. Br. 19; *see also* Dole Br. 35-36 & n.15), foreign countries do not afford *any* state-owned enterprises sovereign-immunity-based protections. *See* Gary Born & David Westin, *International Civil Litigation in United States Courts* 459 (2d ed. 1992). Nevertheless, the FSIA's protections extend to enterprises that are majority owned by foreign states, no doubt based on the congressional determination that suits against such entities pose a risk to foreign relations. Thus, the claim that foreign governments will be content whether or not the FSIA affords any protections to their indirectly owned enterprises cannot be reconciled with Congress's extension of the FSIA's protections to foreign government-owned entities.

2. Although respondents and the Government do not challenge petitioners' demonstration (Dole Br. 27) that the United States lacks any legitimate interest in whether foreign governments use tiered enterprises, they contend that several policies support limiting the majority ownership requirement to directly owned entities. These arguments also conflict with the congressional policies animating the majority ownership requirement.

a. Respondents erroneously contend that reading the majority ownership requirement naturally to include both direct and indirect ownership would frustrate the FSIA's "avowed purpose of aligning U.S. law with international practice." Resp. Br. 26. First, contrary to respondents' assertion (*id.*), the natural reading of the majority ownership requirement advocated by petitioners does not extend the FSIA's immunity beyond prevailing international practice. As the opening brief demonstrated, tiered entities rarely enjoy immunity under the Act and, to the extent that they do, respondents' narrow interpretation of the majority ownership requirement would actually prevent such entities from claiming the sovereign immunity available to them in other countries. Dole Br. 28, 35-36 & n.15.

Second, alignment was not a goal of the FSIA. It is neither one of the "broad purposes" identified in the letter transmitting the bill that became the FSIA to Congress, *see* Letter from Robert S. Ingersoll & Harold R. Tyler, Jr. to Carl O. Albert, October 31, 1975, *reprinted in* H.R. Rep. No. 94-1487, at 45 (1976) [hereinafter "Ingersoll Letter"], nor one of the general purposes identified in the congressional reports, *see* H.R. Rep. No. 94-1487, at 6; S. Rep. No. 94-1310, at 8 (1976). To the contrary, because the FSIA was the first foreign sovereign immunity statute in the world, many of its provisions—including the protections afforded state-owned enterprises—intentionally sweep beyond the minimum requirements of international law. *See, e.g.*, Frederic Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning, and Effect*, 3 Yale Stud. World Pub. Order 1, 42-46 (1976-77); *see also* Gabe Shawn Varges, *Defining a Sovereign for Immunity Purposes: Proposals to Amend the Int'l Law Ass'n Draft Convention*, 26 Harv. Int'l L.J. 103, 108-09 (1985) (noting that the FSIA was intended to "serve as a model for future general international agreement") (quotation marks and citation omitted).

b. Respondents also argue that the natural reading of the majority ownership requirement proposed by petitioners would frustrate the FSIA's goal of facilitating litigation against foreign states and protecting the rights of litigants Resp. Br. 28-33. Although this is, in fact, a goal of the Act, *see* Ingersoll Letter, *supra*, *reprinted in* H.R. Rep. No. 94-1487, at 45, respondents do not show that the natural reading would impose substantial procedural burdens upon litigants. As the Government recognizes (Gov't Merits Br. 29 n.15), suits by American plaintiffs against foreign defendants routinely end up in federal court. *See* 28 U.S.C. §§ 1332(a)(2), 1441(a). Petitioners have previously demonstrated (Dole Br. 6-7) that the FSIA's service of process and venue provisions for agencies or instrumentalities are analogous to provisions in the Federal Rules of Civil Procedure. *Compare* 28 U.S.C. § 1391(f) *and id.* § 1608(b)(2) *with id.* § 1391(c) *and* Fed. R. Civ. P. 4(d)(3). The Act provides agencies and instrumentalities with little, if any, immunity

against attachment, *see* 28 U.S.C. § 1610(b) (depriving agencies or instrumentalities of most such immunity), and, contrary to respondents' suggestion (Resp. Br. 31), it "provides, in effect, a Federal long-arm statute over foreign states." H.R. Rep. No. 94-1487, at 13. It is, of course, true that the FSIA deprives plaintiffs of the right to jury trials in state courts. However, such trials—which are, of course, available only in common law countries—create an obvious danger of discrimination and, therefore, of diplomatic friction in all cases involving entities owned by foreign states, and there is no reason to believe that concern over jury trials led Congress to include only directly owned entities in the majority ownership requirement.

Respondents contend as well that litigants may encounter more difficulty in discovering whether a tiered entity is owned by a foreign government. Resp. Br. 29-30. But respondents have not even begun to show that this is a problem uniquely associated with tiered entities. Nor, for that matter, have they shown that this problem causes any significant prejudice. They cite only one case in which the plaintiff was supposedly surprised to discover that a tiered entity was foreign owned, *O'Connell Mach. Co. v. M.V. "Americana"*, 566 F. Supp. 1381 (S.D.N.Y. 1983), *aff'd*, 734 F.2d 115 (2d Cir. 1984), and there is no indication of any resulting prejudice in that case. Nor does the English Court of Appeal's decision in *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529, suggest otherwise. While that case recognized that extending sovereign immunity to commercial entities creates a risk of surprise, its solution was to reject absolute immunity, *see id.* at 558 (Lord Denning, M.R.); *id.* at 576 (Shaw, L. J.), which the FSIA already does. *See* 28 U.S.C. §§ 1605-07.

c. Both respondents and the Government further claim that a narrow reading of the majority ownership requirement would avoid "potentially complex inquiries" into whether foreign states indirectly own a majority interest in a company. Resp. Br. 33-34; Gov't Merits Br. 20-21. This claim is baseless. Courts routinely make jurisdictional determinations at the beginning of a case, and, as petitioners have already pointed out (Dole Br. 39),

although the corporate history of a party may, as in this case, be somewhat complex, it does not follow that a factual issue of this sort is likely to become the subject of significant dispute. There was no dispute below over the magnitude of Israel's interests in the Dead Sea Companies. Moreover, while in their opening brief petitioners challenged respondents and the Government to cite a case involving such a dispute (*id.*), neither has done so.

Nor is there any merit to the Government's claim that a natural reading of the majority ownership requirement would force courts to assume an improper "policy-making function." Gov't Merits Br. 20. *First*, because none of the petitioners advocate an infinite-tiering approach, there is no need to choose between that approach and the effective ownership approach advocated by the petitioners. *Second*, the judiciary is more than capable of determining the appropriate test for something as relatively objective as ownership, and, in doing so, courts would be exercising far less policymaking authority than they necessarily do in construing vague, undefined terms in the FSIA such as "organ of a foreign state." 28 U.S.C. § 1603(b)(2); *see also Tex. Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 302-03 (2d Cir. 1981) (noting that the FSIA is a "vaguely worded statute . . . described by its draftsmen as providing only 'very modest guidance' on issues of preeminent importance") (quotation omitted). *Third*, neither respondents nor the Government has offered a bright-line alternative to petitioners' interpretation. To the contrary, both fail to offer any clear definition of the "ownership interest" prong, *see* Gov't Merits Br. 18n.7; Resp. Br. 21, and respondents acknowledge (Resp. Br. 36) that their interpretation would force courts to rely more heavily on the vague and policy-laden organ requirement. Thus, respondents' and the Government's interpretation of the majority ownership requirement does not avoid the need for judicial "policy-making" in applying the FSIA.

C. Respondents and the Government Have Not Explained Why Congress Would Have Distinguished Between Direct and Indirect Ownership in the Majority Ownership Requirement

Finally, the interpretation advanced by respondents and the Government must be rejected because it fails to explain why Congress would have wanted the majority ownership requirement to distinguish between direct and indirect ownership. Petitioners have offered a natural, coherent, and sensible interpretation of the majority ownership requirement that explains how the language of the requirement can be read to cover both direct and indirect ownership (Dole Br. at 15-23); that furthers the FSIA's primary objective of protecting foreign relations (*id.* at 23-28); and that comports with both the legislative history and the terminology traditionally used to describe companies indirectly owned by the United States (*id.* at 28-31). By contrast, the interpretation respondents and the Government advance asks the Court to ignore "common parlance" in favor of supposed technical meanings and inapplicable background principles; to ignore the primary objective of the statute in favor of policies that were rejected in the provisions being construed; and to adopt an interpretation that can in practice lead to arbitrary results with no explanation why it is necessary to countenance such results. In short, respondents and the Government have failed to offer a cogent interpretation of the majority ownership requirement, which is no doubt why the majority of lower courts have not adopted their interpretation.

II. THE MAJORITY OWNERSHIP REQUIREMENT SHOULD BE APPLIED HERE TO THE TIME OF THE CONDUCT UNDERLYING SUIT

A. The Majority Ownership Requirement's Use of the Present Tense Does Not Preclude Its Application to the Time of the Conduct Underlying Suit

In providing its views at the certiorari stage, the Government claimed that the majority ownership requirement's use of the

present tense was the "[m]ost telling[]" evidence that the requirement must be applied exclusively to the time of filing. Gov't Br. 15. In its merits brief, the Government virtually ignores tense. While still contending that the word "is" indicates that the majority ownership requirement must be applied to the time of filing, Gov't Merits Br. at 24, the Government does not dispute petitioners' demonstration (Dole Br. 40-41) that the present tense can be used in a temporally indefinite fashion, that statutory drafters frequently use the tense in this fashion, or that this Court has specifically refused to rely upon the tense of the verb "to be" in determining when a statutory provision should be applied. *See Costello v. INS*, 376 U.S. 120, 125 (1964). In fact, the Government concedes that other provisions of the FSIA couched in the present tense apply to conduct prior to the filing of suit. Gov't Merits Br. 24-25 n.13. Thus, it has essentially abandoned its principal argument at the certiorari stage.

By contrast, respondents continue to place heavy reliance on the majority ownership requirement's "unambiguous use of the present tense" based on a series of decisions of the Court. Resp. Br. 41-43. This reliance is misplaced. Most of the passages cited by respondents do not address statutes couched in the present tense,[3] and those that do are inapposite. The decision in *Stafford v. Briggs*, 444 U.S. 527 (1980), observes only that a statutory provision cast in the present tense "*can reasonably be read* as describing the character of the defendant at the time of the suit." *Id.* at 536 (emphasis added). And two of the three remaining cases interpret statutory provisions couched in the present tense to apply to conduct *prior* to the filing of suit. *See Ingalls Shipbuilding, Inc. v. Office of Worker's Comp.*, 519 U.S. 248, 252, 255-62 (1997) (determining status as "person entitled to compensation" at time of settlements that occurred prior to

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[3] *See United States v. Wilson*, 503 U.S. 329, 333 (1992) (construing language in the past and present perfect tenses); *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 116 (1983) (present perfect); *Scarborough*, 431 U.S. at 570 (present perfect); *Barrett v. United States*, 423 U.S. 212, 217 (1976) (present perfect); *Otte v. United States*, 419 U.S. 43, 49-50 (1974) (past).

submission of benefit claims); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (plurality op.) (finding that the "present, active tense of the operative verbs . . . turns our attention to the actual moment of the event in question, . . . the employment decision"). Thus, far from supporting respondents' claim that statutes couched in the present tense must be applied to the time of the filing, respondents' authorities confirm that such statutes can be applied to conduct prior to filing.

Respondents also claim that the service and enforcement provisions of the FSIA support their interpretation because both contemplate companies majority owned by foreign states at the time of filing. Resp. Br. 45. It is, however, by no means clear that the Act's enforcement provisions are properly applied by reference to status at the time of filing. While, as previously demonstrated (Dole Br. 45-46), the FSIA's objectives are served by providing companies that are privatized before filing with the Act's protections in suits arising out of conduct prior to privatization, there is no logical reason to provide companies that are privatized after filing but before enforcement with the Act's protections against attachment and execution. Thus, if anything, the FSIA's enforcement provisions confirm that the majority ownership requirement cannot be rigidly interpreted to apply only at the time of filing, but must instead be interpreted flexibly in the light of the context in which it is being applied.

B. Immunity Law, Not the Diversity Jurisdiction Statute, Provides the Best Model for the Majority Ownership Requirement

In their opening brief, petitioners showed that under the doctrines of domestic sovereign immunity, official immunity, and diplomatic immunity a defendant's status is determined by reference to the time of the underlying conduct. Dole Br. 43-45. Although respondents and the Government contend that jurisdictional statutes provide a better model, their arguments are unpersuasive.

According to the Government, it is a "hornbook principle" that jurisdictional statutes should be applied by reference to the

time of filing and that Congress must therefore be assumed to have drafted the majority ownership requirement with this principle in mind. Gov't Merits Br. 23-24. The Government does not, however, cite any treatises or law review articles recognizing this principle. Moreover, the cases it cites all deal with diversity jurisdiction and simply hold that such jurisdiction cannot be created or lost due to developments after filing.[4] It should therefore come as no surprise that even respondents characterize these cases as establishing only a "rule under the diversity statute," Resp. Br. 44, or that this supposedly fundamental principle escaped the attention of Judge Kozinski in the decision below. Thus, the Government has failed to show that its supposed hornbook principle applies to statutes such as the FSIA, whose jurisdictional provisions are based on "arising under," rather than diversity, jurisdiction. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492-97 (1983).

In any event, the FSIA is not an ordinary jurisdictional statute. *Cf. id.* at 496-97 (noting that jurisdictional statutes do not normally contain substantive provisions). As petitioners' opening brief pointed out (Dole Br. 39), Congress intended the FSIA to confer broad and expansive jurisdiction. *See* H.R. Rep. No. 94-1487, at 13. *See generally In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1241 (3d Cir. 1994). Even more importantly, Congress made jurisdiction under the FSIA turn upon the availability of immunity. Under the Act, federal courts have subject matter jurisdiction whenever there is a claim against a foreign state that is "*not entitled to immunity* either under sections 1605-07 or under any applicable international agreement." 28 U.S.C.

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[4] *See Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 429 (1991) (per curiam) (diversity jurisdiction not lost by assignment of plaintiff's interest); *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957) (jurisdiction not lost by appointment of non-diverse administrator for plaintiff's estate); *Anderson v. Watt*, 138 U.S. 694, 708 (1891) (revocation of non-diverse executor); *Mullen v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (post-pleading claim of diversity); *see also Conolly v. Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829) (permitting diversity to be established by dropping party).

§ 1330(a) (emphasis added). Thus, even in its jurisdictional provisions the FSIA is concerned with immunity. Furthermore, as a practical matter, it makes no sense to say that for jurisdictional purposes the definition of foreign state must be applied at the time of filing when the jurisdictional inquiry turns upon an immunity determination that, as respondents and the Government concede (Resp. Br. 44-45 n.33; Gov't Merits Br. 25 n.13), looks to the time of the conduct underlying the suit. As a consequence, immunity law provides a far better model for construing the majority ownership requirement than a diversity jurisdiction principle of questionable applicability.

Although respondents and the Government offer a number of objections to using immunity law as a model (Resp. Br. 47-48; Gov't Merits Br. 25-28), those objections are easily answered. *First*, it makes no difference that most immunity decisions are not based upon statutory interpretation. As previously argued (Dole Br. 44), "where a common-law principle is well established . . ., the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (quotation omitted).

Second, it does not matter that the domestic sovereign and official immunity doctrines are based upon different functional considerations than foreign sovereign immunity. As the opening brief showed (Dole Br. 44-45), foreign sovereign immunity is rooted in the same functional considerations as *diplomatic* immunity and was in fact derived from that doctrine. *See The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 137-39 (1812).

Third, the Court's decision in *The Western Maid*, 257 U.S. 419 (1922), cannot be distinguished on the ground that it "declined to create a cause of action or substantive liability." Gov't Merits Br. 27 (emphasis omitted). In that decision, the Court refused to apply generally applicable maritime law because the United States had "not consented to be sued for torts." 257 U.S. at 433.

As respondents acknowledge (Resp. Br. 47-48), this is plainly an immunity decision. *See also Blanco v. United States*, 775 F.2d 53, 59 (2d Cir. 1985) (noting that *The Western Maid* provided incentives to enact "a *waiver of sovereign immunity* for damages caused by public vessels") (emphasis added). Thus, the objections of the Government and respondents to using immunity law as a model are without merit.

C. Applying the Majority Ownership Requirement to Privatized Companies in Suits Arising Out of Conduct Before Privatization Serves the FSIA's Goal of Protecting Foreign Relations

Petitioners demonstrated in their opening brief (Dole Br. 45-46) that applying the majority ownership requirement to the time of the conduct underlying suit serves the FSIA's goal of protecting foreign relations because suits against privatized entities based on conduct before privatization can implicate sensitive foreign government interests and therefore create a risk of irritating foreign relations. Neither respondents nor the Government undermine these very practical and concrete considerations.

Their primary response is a theoretical one: once state-owned enterprises are privatized, foreign governments supposedly lose any special interest in those organizations. Resp. Br. 46; Gov't Merits Br. 29. Indeed, the Government goes so far as to assert that a foreign state's interest in a privatized entity "generally would not be substantially different than would be the case if the foreign state" had never owned the entity. Gov't Merits Br. 29. That is preposterous. As the ABA Working Group has recognized, "*actions of foreign states remain potentially politically sensitive even after the entity is sold or otherwise loses its status as a foreign state or instrumentality.*" ABA Working Group, *supra*, at 530 (emphasis added). Moreover, foreign governments often retain a special interest in privatized companies. For example, when Israel began privatizing the Dead Sea Companies and their parents in 1992, it amended the articles of the Dead Sea Companies to give it a "Special State

Share" to ensure that it maintained a veto over any reorganization of the company or sale of a substantial block of its stock. J.A. 73-74, 104-09, 118-23.

Such special shares are not unusual. To the contrary, "governments often attach special conditions to privatization sales, demanding a special or golden share." Dick Welch & Olivier Frémond, *The Case-By-Case Approach to Privatization: Techniques and Examples* 35 (World Bank Technical Paper No. 403: 1998); *see also* Andrei A. Baev, *Is There a Niche for the State in Corporate Governance? Securitization of State-Owned Enterprises and New Forms of State Ownership*, 18 Hous. J. Int'l L. 1, 23 (1995) (noting that the "worldwide popularity [of] the golden share" is due to its promise of maintaining "government power over important industries without a ban on private ownership"). Indeed, the use of golden shares is so prevalent in Europe that just last summer the European Court of Justice issued decisions limiting discriminatory use of such shares. Case C-503/99, *Comm'n of the European Communities v. Kingdom of Belgium*, O.J. 2002 C169/4 (2002); Case C-483/99, *Comm'n of the European Communities v. French Republic*, O.J. 2002 C169/3 (2002). The claim that foreign countries lose all special interest in state-owned enterprises after privatization cannot be reconciled with this reality.

The Government also contends that any affront to a foreign state from litigation involving privatized companies is likely to be remote and, in any event, not the "sort of affront" that would implicate the objectives of the FSIA. Gov't Merits Br. 29. That is also incorrect. As petitioners demonstrated in their opening brief, under routine indemnification provisions, foreign governments can be the real party in interest in suits against privatized entities arising out of conduct before privatization. Dole Br. 45-46. Unable to dispute this, respondents and the Government suggest that the act of state doctrine will take care of any concerns raised by such cases. Resp. Br. 47; Gov't Merits Br. 28. The act of state doctrine will not, however, minimize the threat of foreign policy disruption when a foreign government is the real party in interest in a commercial dispute due to an

indemnification agreement. Nor is it clear that the act of state doctrine would apply in all politically sensitive cases involving privatized entities because, as this Court has observed, "[a]ct of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990). In any event, because Congress intended the FSIA to "deal *comprehensively* with the subject of foreign sovereign immunity," *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (emphasis added), any interpretation of the FSIA that requires other sources of law to fill a gap must be rejected.

Finally, even assuming the Government is correct in asserting (Gov't Merits Br. 29) that the United States "has not encountered 'diplomatic friction' arising from post-privatization litigation," that assertion does not advance the Government's position. As the Government recognized in its prior brief (Gov't Br. 14-15), every court of appeals to decide the issue has held that state-owned enterprises are not stripped of the protections they enjoyed under the FSIA for their prior conduct once they are privatized. Moreover, while respondents cite a number of cases supposedly suggesting otherwise, Resp. Br. 46 n.35, only one of them even considered the issue and, even then, did so only in dictum. *See Ocasek v. Flintkote Co.*, 796 F. Supp. 362, 365 (N.D. Ill. 1992). Thus, there does not appear to have been any litigation in which a privatized entity sued for conduct before privatization has been denied the FSIA's protections, and therefore no suit in which the denial of such protection might have created diplomatic friction. As a consequence, the United States' lone practical argument is without merit.

CONCLUSION

For the reasons stated above, as well as those stated in the opening brief of the Dole Petitioners and the briefs of the Dead Sea Petitioners, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DEAD SEA BROMINE CO., LTD. and BROMINE COMPOUNDS LIMITED,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statement was set forth at page *ii* of their Petition for a Writ of Certiorari, and there are no amendments to that Statement.

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I. The State Of Israel "Owned" A Majority Of The Shares Of And Had A Majority "Ownership Interest" In DSB.

A. Respondents and the United States Fail to Refute that the Plain Meaning of "Owned" and "Ownership Interest" in § 1603(b)(2) Encompasses Israel's Majority Ownership Stake in DSB.

Respondents and the United States devote a great deal of energy attempting to demonstrate that "own" – on its face a general term with a variety of usages – is a word that can only be understood to mean direct ownership or legal title. They fail, however, to cite a single authoritative source for that proposition. Rather, their arguments rest on a discussion of certain "bedrock" principles of corporate law relating to the separateness of corporate entities and rules concerning veil piercing and limitations on liability – precepts that have no relevance to the question of statutory interpretation at issue. Similarly, they do not even try to controvert DSB's showing that "ownership interest" is a broad term, commonly used to describe the interest a corporate shareholder has in the corporation's subsidiaries, but instead rely on inapplicable canons of statutory construction to urge that the plain meaning of the term should be ignored.

1. A Shareholder of a Parent Corporation "Owns" the Shares of a Subsidiary Corporation.

It is beyond dispute that the word "own," and similar words such as "ownership" or "owned," are frequently used in formal legal contexts to describe the connection between a corporation's shareholder and the corporation's subsidiary: that is, a corporate shareholder is said to "own" the shares in or property of a corporation's subsidiary or to be a "shareholder" of the subsidiary. This Court has so used these words in such diverse contexts as: (a) trademarks, in a case in which a subsidiary's trademark was held to have been "owned by" the parent corporation (*K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 292, 298-99, 318-19 (1988)); (b) the law of standing, in which a parent corporation was held to have standing to bring a tax case on behalf of its subsidiary's subsidiary, an entity in which it

was, according to the Court's usage, a "shareholder" (*Franchise Tax Board of California v. Alcan Aluminium Ltd.*, 493 U.S. 331, 339 (1990)); (c) a personal injury case on the high seas, in which stockholders were held to be the "owners" of their corporation's vessel, enabling them to assert certain limited liability protections available to vessel owners (*Flink v. Paladini*, 279 U.S. 59, 63 (1929)); (d) a securities and antitrust case, in which a third-tier subsidiary was equitably estopped from bringing an action as to which estoppel barred its great grandparent corporation, an entity described as having "ownership of about 98.3% of the outstanding stock" of the third-tier subsidiary (*Bangor Punta Operations, Inc. v. Bangor & Aroostoock R.R.*, 417 U.S. 703, 706 (1974)); and (e) an antitrust case, in which a parent and its subsidiary were held to be incapable of entering into an antitrust conspiracy because they are "subject to common ownership" (*Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 759 (1984)). DSB Br. 21-23.

Plainly, the word "own" and similar words may be and frequently are appropriately used to refer to the interest of a shareholder of a corporation in a corporate subsidiary or its assets. Respondents' attempt to distinguish these authorities on the ground that they involved veil piercing, *see* Resp. Br. 19, is in error. None of these decisions involved fraud or reaching back in any way to hold shareholders responsible for corporate liabilities. *See United States v. Bestfoods*, 524 U.S. 51, 62 (1998) ("veil piercing" is doctrine under which "the shareholder [is] held liable for the corporation's conduct when . . . the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf"). Nor was this the purpose for which these cases were cited. DSB readily agrees that it is a separate entity from both its parent corporations and the State of Israel, and there is no basis to "pierce the corporate veil" to hold DSB's parent or the State liable for any alleged tort committed by DSB. *See* DSB Br. 24. Rather, the purpose of citing these cases is to establish that the ordinary meaning of the words "shares . . . *owned* by a foreign state" in § 1603(b)(2) encompasses the State of Israel's

ownership of DSB's shares through the State's ownership of DSB's parent entities.

None of the arguments presented by respondents or the Solicitor General rebut this point. Their briefs go to great lengths (Resp. Br. 16-19; U.S. Br. 10-12) to establish that DSB is a "separate entity" from its parent corporations – which, as noted above, is undisputed. The fact that DSB is a separate entity, however, has nothing to do with whether its shares were "owned" by the State.[1]

DSB is not arguing that "corporate separateness is meaningless or may be disregarded on a routine basis." Resp. Br. 20. When faced with the issue of whether a corporate shareholder (or parent corporation) may be held liable for the actions of a subsidiary, this Court, like the highest courts of all fifty states, generally resists such a result, because Congress is presumed to legislate in light of the "bedrock" principle that a shareholder is not liable for corporate debts. *Bestfoods*, 524 U.S. at 62.[2] This "bedrock" principle of limited liability, however, does not control the meaning of the word "owned" in § 1603(b)(2). The plain meaning of this word is established by its usage by this Court and numerous others, *see* Dole Br. 17-19, to encompass shareholder ownership of a corporation's assets or subsidiaries.

In its initial brief, DSB noted that the words in § 1603(b)(2) at issue here – "owned" and "ownership interest" (the latter term is discussed below) – are not defined in the statute and therefore should be construed in accordance with their "'ordinary or natural meaning.'" DSB Br. 25 (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)). In response, the Solicitor

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1. Respondents' reliance on case law expounding the separate entity doctrine, *see* Resp. Br. 17-18, is particularly odd, in view of Congress' explicit decision to part from that doctrine and bring corporate entities owned by foreign states squarely within the reach of the statutory scheme. *See* 28 U.S.C. § 1603(b)(1); DSB Br. 36-38; *accord* Resp. Br. 36 ("Congress did not intend to adopt the separate entity rule").

2. It is for this reason that the FSIA provides that the assets of an agency or instrumentality will be available to enforce a judgment only against that particular agency or instrumentality. *See* U.S. Br. 11 n.2.

General asserts that "'[w]ords that have acquired a specialized meaning in the legal context must be accorded their *legal meaning*.'" U.S. Br. 13 (quoting *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 615 (2001) (Scalia, J., concurring)); *see also* Resp. Br. 14. But respondents and the Solicitor General fail to show that the exclusive "legal meaning" of the word "owned" is the narrow concept of title such as they propose, or that the broader usage of this word by this Court and others is in error. In fact, the word "owned," standing alone, plainly encompasses both a narrow and a broader concept.

The broad "legal meaning" of the word "owned" is powerfully illustrated by Congress' repeated use of the word in respondents' long list of federal statutes using the phrase "directly or indirectly owned" or similar formulations involving the words "owned" or "ownership" and "directly" and "indirectly." Resp. Br. 15 n.6; *see also* U.S. Br. 15. These statutes demonstrate that the words "owned" and "ownership" encompass indirect as well as direct ownership. The fact that in the FSIA Congress included neither the word "directly" nor the word "indirectly" does not establish that "owned" means "directly owned." To the contrary, the use of the word "owned" without any limiting adverb suggests that its breadth should not be artificially restricted by a judicial interpretation that inserts the modifier "directly," when Congress chose not to do so. *See Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001).

2. The State of Israel Held an "Ownership Interest" in DSB.

DSB has demonstrated that "ownership interest" is a term with a broad and well established meaning that clearly encompasses the nature of the interest that the State of Israel had in DSB. DSB Br. 25-30. Therefore, even if the State of Israel cannot be said to have owned the "shares" of DSB, the State had a majority "ownership interest" in the company that satisfies this alternative requirement of § 1603(b)(2).

The Solicitor General dismisses this argument in a single footnote, contending that the State of Israel could not have had an "ownership interest" in DSB because DSB issued "shares" that were owned by its parent corporation and thus did not have any "other ownership interest" that could have been owned by the State. U.S. Br. 17 n.7. This linguistic sleight of hand simply disregards the plain meaning of the term "ownership interest." DSB has provided numerous examples of the use of the term "ownership interest" to describe the nature of the interest that a shareholder or grandparent corporation has in tiered corporate subsidiaries in which the shareholder or grandparent corporation has no direct share ownership. DSB Br. 26-27. Neither the Solicitor General nor respondents address these authorities. And the Solicitor General offers no rationale whatsoever why the term "ownership interest" in the FSIA should not be construed as it is ordinarily used.

In attempting to avoid the plain meaning of the term "ownership interest," respondents place principal reliance on the assertion, also articulated by the Ninth Circuit below, that the ordinary reading of the term would render superfluous the antecedent statutory reference to "shares." Resp. Br. 21-22. This argument concedes the broad meaning of "ownership interest" urged by DSB; there would otherwise be no need to invoke a limiting canon of construction. DSB refuted the superfluity analysis in its initial brief. DSB Br. 40-41. Respondents notably fail to address DSB's rebuttal.

Respondents also allude to the canon *ejusdem generis* ("of the same kind"). Resp. Br. 21. That canon, however, like the related presumption against superfluousness, *see* DSB Br. 40, has no utility where it would result in a "depart[ure] from the primary rule that words are to be taken in their ordinary sense." *Danciger v. Cooley*, 248 U.S. 319, 326 (1919); *see also United States v. Turkette*, 452 U.S. 576, 581 (1981); *Harrison v. PPG Ind., Inc.*, 446 U.S. 578, 588 (1980); *United States v. Powell*, 423 U.S. 87, 91 (1975). Since neither respondents nor the Solicitor General present any authority for a more restrictive

definition of "ownership interest," the *ejusdem generis* canon cannot be used the trump the plain meaning of that term.[3]

In any event, application of the canon should not lead to a contrary result. If the words "ownership interest" are to be limited or construed in light of the more specific word "shares," "ownership interest" must include any kind of ownership akin to share ownership. For the reasons already noted, "share ownership" should be understood to include indirect as well as direct share ownership. *See* 1-4, *ante*. But if that is incorrect, indirect share ownership would seem to be a type of ownership as closely analogous to direct share ownership as one could imagine and would therefore be encompassed by the term "ownership interest." *See* DSB Br. 40-41; Dole Br. 22-23.

Respondents and the Solicitor General suggest that allowing indirect ownership would create uncertainty and complexity in ascertaining the existence of a majority interest. Resp. Br. 22; U.S. Br. 20. Percentage ownership interest, however, is derived by multiplying the percentage ownership at each corporate tier, an exercise in grade school arithmetic. For example, if the foreign state holds 80% of the shares of a corporation that in turn holds 80% of the shares of a subsidiary, the foreign state's ownership interest in the subsidiary is 64% (80% x 80%). Alternatively, if the same parent corporation's stake in the

3. Moreover, *ejusdem generis* is inapplicable where a specific reason can be inferred why the legislature may have included a single specific word preceding a more general term. *See Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 44 n.5 (1983) (declining to apply canon to limit breadth of "minerals," as Congress could have included antecedent reference to "coal" due to its special treatment in other statutes); *Norfolk & Western Ry. v. American Train Dispatchers' Assoc.*, 499 U.S. 117, 129 (1991) (declining to apply canon to limit breadth of "law," as Congress could have included antecedent reference to "antitrust laws" to prevent application of canon that implied repeals of antitrust laws are disfavored). In the case of the FSIA, Congress may have thought it necessary to reference "shares" to make clear that corporations could be eligible for "agency or instrumentality" status notwithstanding the pre-FSIA rule that they were "separate entities" that could not assert sovereign immunity status. DSB Br. 36-38.

subsidiary were only 50%, the foreign state's ownership interest in the subsidiary would be 40% (80% x 50%). The foreign state would hold a majority ownership interest in the first situation but not in the second. Application of the plain meaning of "ownership interest" is entirely compatible with a preference for "administrable, predicable, bright-line [jurisdictional] rule[s]." Resp. Br. 23.[4]

Respondents criticize DSB's discussion of the nature and degree of Israel's oversight and control over the company under the Government Companies Law (DSB Br. 8-14) as an effort "to smuggle the FSIA's 'organ' test into the entirely separate 'ownership' inquiry of Section 1603(b)(2)." Resp. Br. 24. This discussion, however, serves simply to illustrate how bizarre and illogical it would be to conclude that the State of Israel did not have a majority ownership interest in DSB on this record. Under the Government Companies Law, by virtue of the State's majority ownership interest in DSB through a tiered corporate structure, the State exercised substantial control over DSB, essentially the same as that it would have had if DSB had been directly owned by the State; and the State had far reaching rights to supervise and manage DSB's affairs well beyond the rights of a majority direct shareholder in a U.S. corporation. DSB Br. 28-30.[5]

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4. There is no suggestion in their briefs that respondents or the Solicitor General disagree with DSB's calculation of Israel's varying percentage ownership interest in DSB during the relevant time period. *See* DSB Br. 5-7.

5. Respondents devote the first four pages of their argument (Resp. Br. 10-14) to a critique of the recursive interpretation of § 1603, which holds that an entity majority owned by a foreign state is an "agency or instrumentality of a foreign state" (per § 1603(b)(2)) and thereby a "foreign state" (per § 1603(a)), making any entity majority owned by that "foreign state" an "agency or instrumentality of a foreign state" (per § 1603(b)(2)). The discussion is beside the point, as DSB does not rely on the recursive theory. DSB Br. 39 n.15.

B. Respondents' Proffered Policy Arguments Apply As Much to a Corporation Directly Owned by a Foreign State As to Its Indirectly Owned Subsidiaries and In Any Event Are Unpersuasive.

Respondents present a host of reasons why they believe Congress should not have included a corporation indirectly owned by a foreign state in the Act's definition of "foreign state." These arguments, however, apply equally to a corporation directly owned by a foreign state as to a majority-owned subsidiary and, accordingly, provide no basis to draw a line between the two. Since whether such a line should be drawn is the issue in this case, respondents' arguments are irrelevant and, in any event, do not withstand analysis.

Respondents assert that DSB is a "commercial mining enterprise[] whose operations are far removed from the core concerns of the FSIA." Resp. Br. 2. While DSB is a commercial mining enterprise, the same is true of its parent entity (although its parent might be more accurately described as a mining and chemicals enterprise). Thus, the fact that DSB is involved in mineral extraction does not distinguish between it and its directly state-owned parent. Nor is it true that a mining company is "far removed from the core concerns" of the Act. Insofar as the Act addresses commercial activities of foreign state entities, its core concern is to provide certain procedural protections, such as a right to a federal forum and a non-jury trial, when legal claims are asserted against them in the United States. 28 U.S.C. §§ 1330(a), 1441(d); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983); *Ruggiero v. Compania Peruana De Vapores*, 639 F.2d 872, 875-78 (2d Cir. 1981). The legislative history reflects the Congressional determination that a "mining enterprise" owned by a state, like a state-owned trading enterprise, shipping line, airline or steel company, be accorded the protections of the Act. DSB Br. 33-34 (quoting H.R. Rep. No. 94-1487 at 16).

Respondents point to the fact that under "prevailing international [law] . . . foreign state-owned entities . . . are not entitled to sovereign immunity based on direct foreign ownership." Resp. Br. 26; *see also* U.S. Br. 18-19. Yet Congress

endorsed a very different approach when it allowed state-owned corporations to assert "agency or instrumentality" status under the Act. The international rule provides no basis to distinguish between an entity directly owned by a foreign state and its subsidiary, as neither would be an "agency or instrumentality" under the international rule. Moreover, it is illogical to rely upon a rule Congress rejected to interpret the scope of the Act.[6]

Respondents suggest that the Act would more closely reflect the practice in other countries if FSIA status turned on "performance of governmental purpose, not tiered ownership." Resp. Br. 27. Of course, "governmental purpose" does not distinguish between directly owned corporate entities and their subsidiaries and is therefore irrelevant to the issue at bar. More fundamentally, here too Congress specifically rejected such an approach, allowing any and all state-owned commercial entities to assert "agency or instrumentality" status under the Act.

Respondents dubiously suggest that corporate entities assert FSIA status "to the detriment of U.S. citizens and of U.S. companies that must compete with these foreign entities." *Id.* 29. Allowing "agencies or instrumentalities" to remove an action from state to federal court (28 U.S.C. § 1441(d)) does not injure U.S. citizens or U.S. companies. In most commercial cases (and certainly most commercial cases involving U.S. citizens), the "agency or instrumentality" will *not* be able to assert sovereign immunity (*id.* § 1605) and the case will proceed in federal court. In a narrow category of commercial cases, typically those *not* involving U.S. plaintiffs, the required "direct effect in the United States" may be absent, *see Verlinden*, 461 U.S. at 497 n.23, and the claim against the agency or

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6. Congress intended to conform to international practice in adopting the restrictive theory of sovereign immunity, but rejected a particular aspect of such practice in allowing state-owned commercial enterprises to assert "agency or instrumentality" status under the Act. *See* U.S. Br. 18-19 ("foreign states do *not* grant sovereign-immunity-based protections of any kind to government-owned corporations"). The over-broad assertion that the Act was intended to "align[] U.S. law with international practice," Resp. Br. 26, elides this distinction.

instrumentality will be dismissed for want of subject matter jurisdiction. Nothing in this framework creates either a substantial burden on U.S. citizens or U.S. corporations, or provides any basis to distinguish between entities directly and indirectly owned by foreign states. In any event, if and to the extent there is a detriment to U.S. citizens or businesses, Congress has decided that in balancing such interests with its goals in enacting the FSIA, the statutory objectives take precedence.

Respondents assert that the "FSIA eliminates personal jurisdiction principles of state long-arm statutes," and "prohibits jury trials" with respect to claims against foreign states and their agencies or instrumentalities. Resp. Br. 31, 32. These concerns, whatever their merit, have no bearing on whether the statute should be interpreted to distinguish between parent corporations and their subsidiaries.

Respondents assert that the FSIA should not offer immunity to a corporate entity that does not have immunity under the laws of the foreign state in which it is incorporated. *Id.* 35. Again, however, this consideration does not differentiate between government-owned corporations and their subsidiaries, since, typically, neither entity is entitled to sovereign immunity under the laws of foreign states. *See* U.S. Br. 18-19. Similarly, the FSIA provides protection to "political subdivisions" – such as cities and village governments – notwithstanding the fact that such municipal entities have no sovereign immunity in foreign jurisdictions. Respondents' contention is a critique of the breadth of the FSIA, not an effort to interpret its terms. Respondents' other arguments are similarly off-base.[7]

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7. Respondents assert that a state "'imparts none of its attributes of sovereignty'" to an entity in which it owns shares, Resp. Br. 17 (quoting *Briscoe v. Bank of Ky.*, 36 U.S. 257, 325-26 (1837)), but that is the separate entity rule the FSIA specifically rejects – as respondents elsewhere concede. *Id.* 36. Respondents' suggestion that "foreign corporations . . . *directly* owned by a foreign government may have a 'hidden identity,'" *id.* 29-30, is merely a critique of the Act. Finally,

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The Solicitor General favorably cites an American Bar Association report, *see* U.S. Br. 21, but in that report a group of distinguished practitioners and law school professors concluded that inclusion of tiered entities as agencies or instrumentalities would best serve "the purposes and structure of the Act." Working Group of the American Bar Ass'n, *Reforming The Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, 522 (2002). Contrary to the implication of the Solicitor General's citation, the report recommends that the Act be amended to clarify this point due to the uncertainty created by the conflict in the case law this Court granted *certiorari* to resolve – not because the report's authors determined that the Act as currently drafted excludes tiered subsidiaries. *Id.*

Nor is there merit to the Solicitor General's assertion that DSB is asking this Court to "thrust itself into a policy-making function that does not ordinarily reside in the Judicial Branch." U.S. Br. 20. DSB is merely asking the Court to confirm the judgment of the vast majority of lower courts that have considered the issue and interpret the words "owned" and "ownership interest" in the Act in accordance with their ordinary meaning, which is in harmony with the policies underlying the statute.

II. The Relevant Period For Determining An Entity's FSIA Status Includes The Time Of The Acts At Issue.

A. The "Plain Meaning" Arguments Presented by Respondents and the Solicitor General Are Meritless.

The first heading of Point II of the United States' brief asserts that "[t]he plain terms of the FSIA grant protection to those entities that satisfy the FSIA's definitional requirements at the time of suit." U.S. Br. 23. Yet the discussion beneath the heading skips over the "plain terms" of the Act and proceeds to a

(Cont'd)
respondents decry the Act's provision of federal court jurisdiction over "garden-variety tort and contract claims," *id.* 41, but this complaint, too, is more aptly addressed to Congress and provides no basis to distinguish between directly owned and subsidiary companies.

supposed "hornbook principle governing jurisdictional statutes" that "'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" U.S. Br. 24 (quoting *Mollan v. Torrance*, 22 U.S. 537, 539 (1824)); *see also* Resp. Br. 44. Notably, no hornbook is cited for this proposition. Instead, the Solicitor General and respondents rely upon *Mollan* and several other cases, all of which concern diversity jurisdiction.

It is indeed well established that diversity must exist at the time an action is commenced for a federal court to exercise diversity jurisdiction. But these cases do not articulate a generally applicable principle that governs all fonts of jurisdiction. Federal question jurisdiction, for example, has nothing to do with the status of the parties on the date that an action is commenced. Rather, it turns on whether an action is one "arising under" the Constitution, laws, or treaties of the United States. U.S. Const., Art. III, § 2. The existence of such jurisdiction depends on the *issues* in the case, and whether they raise a federal question, which turns on whether some event – often a *past* event – gives rise to a claim or defense grounded in federal law. *See Verlinden*, 461 U.S. at 494 (well pleaded complaint rule does not govern scope of Article III "arising under" jurisdiction).

It is of particular relevance that federal question cases do not turn on the status of the parties on the date an action is commenced, because the constitutional basis for the exercise of subject matter jurisdiction in FSIA cases is the "arising under" clause in Article III. *Id.* at 493. Since "arising under" jurisdiction turns on the presence of a federal question rather than the status of the parties at the time an action is brought, the fact that DSB is no longer majority owned by the State of Israel has no bearing on whether a court has jurisdiction over this action under the FSIA. There is no "hornbook" or other principle of law to the contrary.[8]

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8. The implementing jurisdictional statute sheds no further light on the timing issue, as it simply incorporates the definition of "foreign state" in 28 U.S.C. § 1603, which is the focus of this case. *See* 28 U.S.C. § 1330(a).

In a nod in the direction of a "plain language" argument, the Solicitor General notes that the operative language of § 1603(b)(2) uses the word "is" but provides no support – other than an irrelevant quotation from a diversity case – that "is" refers to the date an action is commenced. U.S. Br. 24 n.13. Indeed, the Solicitor General forthrightly acknowledges the correctness of petitioners' observation (DSB Br. 42-43; Dole Br. 41-42) that the FSIA elsewhere uses the present tense to refer to events that occurred at the time of the circumstances giving rising to the lawsuit. U.S. Br. 24 n.13.

Respondents press the plain language argument more forcefully, focusing their attention on Congress' use of the word "is." However, they too fail to address the authorities petitioners have cited which show that the use of the present tense in a federal statute does not necessarily refer to the date on which a suit is commenced and, in fact, frequently refers to past or future time periods. *See* Dole Br. 40-41 (quoting and citing legislative drafting references, including the *House Legislative Counsel's Manual on Drafting Style*); DSB Br. 41-43 (quoting grammar book and case law). Instead, respondents cite a number of other cases (*see* Resp. Br. 42-43), most of which have no relevance to the issue at bar.

In four of the cases, this Court held that a federal statute that uses a verb in the past or past perfect tense should be interpreted to refer to a past event.[9] Quite obviously, the fact that past tense verbs from other statutes have been interpreted

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9. *See United States v. Wilson*, 503 U.S. 329, 333 (1992) (statute's reference to "sentence was imposed" and "has spent in official detention" implies that imposition of sentence and time spent in official detention occurred in the past, prior to the calculation of jail time credit); *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 111 (1983) (statute's reference to "who has been convicted" refers to conviction that occurred in the past); *Barrett v. United States*, 423 U.S. 212, 216 (1976) (statute's use of "has been" shipped in interstate commerce means event must have occurred in the past); *Otte v. United States*, 419 U.S. 43, 49 (1974) (statute's use of "performed any service" in defining an employee refers to former employees who "performed" the service in the past).

to refer to past events sheds no light on the issue here. Inexplicably, respondents cite three other cases in which this Court construed present tense verbs in a federal statute as referring to events occurring in the past, prior to the date a litigation is commenced, an interpretation that supports DSB's position that present tense verbs do not necessarily refer to the date an action is commenced.[10] In all of these cases, the Court examined Congress' choice of verb tense, together with the rest of the statutory language, its context and the legislative purpose. In some, the Court found the tense of the verb to be significant, *see, e.g., Barrett*, 423 U.S. at 217 ("statute's pattern is consistent and no unintended misuse of . . . tense is apparent"); in others, the verb tense was notably unhelpful, *see, e.g., Scarborough*, 431 U.S. at 571 ("Congress' choice of tenses is not very revealing"). Altogether, these cases provide no support for respondents' argument.

Respondents also cite *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), which construed a Clean Water Act provision under which a citizens suit may be commenced against any person "alleged to be in violation of" the Act if the violation is not corrected within 60 days after the plaintiff has given a pre-suit notice. *See* 33 U.S.C. §§ 1365(a)(1), 1365(b)(1)(A). *Gwaltney* held that, by using the phrase "alleged to be in violation" and giving the alleged violator an opportunity to avoid a suit by coming into compliance prior to commencement of suit, Congress evidenced

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10. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (civil rights statute's reference to "fail or refuse to hire" involves the use of "operative verbs" in the "present, active tense" to refer to adverse employment decisions in the past, prior to initiation of employment discrimination litigation); *Scarborough v. United States*, 431 U.S. 563, 570 (1977) (statute's use of "receives, possesses, or transports . . . any firearm" refers to actions that occurred in the past, prior to indictment); *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation*, 519 U.S. 248, 255 (1997) (construing "enters into a settlement" as referring to a settlement entered into in the past, prior to person's filing for death benefits against the employer under the statute).

an intent that the alleged violation exist at the time the action is commenced. 484 U.S. at 60. There is no comparable language or structural device in the FSIA that suggests such a result here.

Finally, respondents point to *Stafford v. Briggs*, 444 U.S. 527 (1980). The statutory language in that case established venue in a mandamus action in which "a *defendant is* an officer or employee of the United States or any agency thereof *acting* in his official capacity or under color of legal authority. . . ." 28 U.S.C. § 1391(e) (emphasis added). Such language focuses on the status and actions of the *defendant*, a status that exists only upon the filing of a complaint. Nothing in the FSIA, however, requires that an agency or instrumentality of a foreign state be owned by the foreign state on the date that an agency or instrumentality is named as a defendant. Moreover, in reaching its conclusion the Court in *Stafford* discussed the purpose, structure and Congressional intent of the statute and noted only that the sentence at issue can "reasonably be read as describing the character of the defendant at the time of suit," 444 U.S. at 535, not that such a reading is compelled by the use of the present tense alone.

Respondents seek to bolster their argument based upon the FSIA provisions pertaining to service of process and execution of judgments upon an "agency or instrumentality." *See* Resp. Br. 45; 28 U.S.C. §§ 1608(b), 1610. Yet nothing in these provisions suggests that an entity must be owned by a foreign state at the time suit is commenced. Indeed, the rules for service of process are analogous to rules of service on any private corporation in the United States, which is typically effected by service on the corporation's officers or directors, *cf.* 28 U.S.C. § 1608(b)(2) (service on officer or managing agent), or on the Secretary of State of the state in which the corporation is organized, *cf. id.* § 1608(b)(3)(A) (service "as directed by an authority of the foreign state or political subdivision").

There is no substance to respondents' suggestion that petitioners (and, by implication, the circuit courts that have unanimously ruled against respondents' position on the

timing issue) are attempting to rewrite § 1603(b)(2) by changing "is" to "was" and adding the phrase "at the time of the acts upon which the complaint is based." Resp. Br. 43-44. The word "is" does not itself say whether a status must exist at the time of the acts giving to a lawsuit or at the time a lawsuit is filed. There would be nothing remotely unusual or ungrammatical about § 1603(b)(2) if it had said "is, at the time of the acts upon which the complaint is based, an organ of a foreign state, etc." Accordingly, DSB's argument does not turn on changing "is" to "was." It is of course true that the phrase "at the time of the acts upon which the complaint is based" does not appear in the statute – but neither does the phrase "at the time of the filing of the lawsuit." Since neither phrase appears in the text of the statute, the text alone does not resolve the timing issue. It is therefore appropriate to take into account the policies and objectives of the statute, as well as the general principle developed in connection with other immunity doctrines that immunity is not divested merely because of a change in status prior to the time a lawsuit is commenced.

B. The Policy and Other Non-textual Arguments Presented by Respondents and the Solicitor General Should Not Prevail.

Respondents assert that "[i]t would be difficult to think of a more dramatic expression by a government that its direct interest in a company has ended than privatization." Resp. Br. 46. The record is to the contrary. It was upon the privatization of DSB in the 1990s that the State of Israel required amendments to its corporate charter declaring that the State has "Vital Interests" in DSB and giving the State a Special State Share that continues to vest in the State extraordinary approval rights with respect to DSB's affairs. JA 107-08, 73-74; DSB Br. 7.

The American Bar Association report cited by the Solicitor General concludes that "actions of foreign states remain potentially politically sensitive even after the entity

is sold or otherwise loses its status as a foreign state or instrumentality" and for this reason concludes that the FSIA's "policies favor applying the statute . . . when the defendant was a foreign state or instrumentality either when the alleged violation [tort or other legal wrong] occurred or when the complaint is filed." *Reforming The Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. at 530. The Solicitor General disagrees with this conclusion, opining that "the United States has not encountered 'diplomatic friction' arising from post-privatization litigation." U.S. Br. 29. Of course, as the Solicitor General conceded in his brief in support of certiorari, *see* U.S. Br. 14 (May 2002), with the exception of a lone district court, every court that has reached the timing issue, including four federal circuits, has held that the protections of the FSIA remain in place with respect to pre-privatization conduct after an instrumentality's privatization. *See* DSB Br. 48. That no "diplomatic friction" has developed under a virtually uniform interpretation of the Act permitting former instrumentalities to invoke its protections hardly suggests that the same would be true if this Court were to adopt the opposite interpretation.[11]

The Solicitor General also opines that the "foreign state's interests in a suit against a *former* majority-owned corporation are likely to be . . . attenuated." U.S. Br. 28. Again, no support is given for this conclusion. One need look no further than the complaint in this action to discern why a foreign state might well retain a significant interest in the process and rules by which claims against a former instrumentality may be pursued. Respondents' pleading alleges that their exposure to DBCP caused them "serious

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11. Respondents err in suggesting (Resp. Br. 46 n.35) that the courts are split on the issue. With the exception of a lone district court decision, *Ocasek v. Flintkote Co.*, 796 F. Supp. 362 (N.D. Ill. 1992), the cases they cite do not address whether foreign state status at the time the cause of action arose would be sufficient to create FSIA jurisdiction. DSB Br. 48 n.20.

and permanent injuries," including sterility, cancer, birth defects, and miscarriages (JA 27); that industry scientists learned as early as 1958 that DBCP exposure caused "testicular atrophy" and adverse "liver, lung and kidney effects" (JA 28-29); that the industry manipulated the information submitted to the federal government in 1961 to register the pesticide without scrutiny of adverse health effects (JA 29); that the industry failed to warn agricultural workers who used the products of its dangers and failed to recommend use of safety devices when handling the product (JA 32); that even after the U.S. Environmental Protection Agency banned the product the industry continued to promote its use in Central America (JA 33); and that in hearings before a Senate Committee, Senator Leahy excoriated the industry, stating that "[t]he tale of DBCP is an appalling one" (JA 34).

In fact, DSB (and its BCL subsidiary) have little or nothing to do with any of these allegations (which remain unproven at this stage of the litigation) and were not even named as direct defendants in this suit. But what if DSB had been the sole or principal manufacturer of DBCP, or the entity that initially researched its health effects, or that handled its early registration with the U.S. government, at a time it was majority-owned by Israel and subject to the oversight regime reflected in Israel's Government Companies Law? In such circumstances, it would likely have been a prime target of the plaintiffs' quest for an adverse judgment, and Senator Leahy's public condemnation. One can easily imagine, were those the facts, that the State of Israel – or any similarly situated foreign state – might have a strong interest in how the American judicial system adjudicates such claims. It might, for example, have significant concerns as to how a remote state court jury would adjudge its conduct during the time period in which it owned the defendant, or how the defendant's association with the foreign state might affect

the adjudication of the claims.[12] Thus, the lower courts and American Bar Association working group are clearly correct in concluding that suits against entities formerly owned by a foreign state fall within the class of lawsuits that the FSIA was enacted to address, since they require a court in this country to "'judg[e] the acts of another nation.'" DSB Br. 44 (quoting *GE Capital Corp. v. Grossman*, 991 F.2d 1376, 1381 (8th Cir. 1993)).[13]

Under other immunity doctrines – such as sovereign immunity, the qualified immunity of government employees, diplomatic immunity and the absolute immunity of judicial officers – immunity in existence with respect to alleged conduct is not lost upon a change in status of the potential defendant. DSB Br. 46-47; Dole Br. 43-45. Respondents and the Solicitor General assert that the timing rule for foreign sovereign immunity should be different from the other immunity doctrines because they are rooted in the common law rather than statute. Resp. Br. 48; U.S. Br. 26. No basis is offered, however, as to why this consideration warrants a different timing rule. Nor is there anything in the text or legislative history of the FSIA, which codified the common law doctrine of foreign sovereign immunity, that suggests

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12. Add to this hypothetical, as in fact happened in this case, that essentially identical claims have been asserted against the foreign state instrumentality in almost a dozen lawsuits brought in separate county courts in Texas, Louisiana and Hawaii, and the foreign state might be expected to have a very strong interest in a right to the more uniform and consistent forum provided by a federal non-jury trial.

13. The suggestion that "that concern is already addressed by the act of state doctrine" (Resp. Br. 47) ignores the Congressional determination to enact the FSIA precisely because that doctrine is inadequate to the task, since it is implicated only to the extent a suit requires "a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990).

Congress expected the courts to depart from the way in which the timing issue is handled under other immunity doctrines. Indeed, the Solicitor General essentially concedes as much, acknowledging that in certain circumstances foreign sovereign immunity might be asserted "based on past conduct by a *non*-natural person that has lost its sovereign status." U.S. Br. 26. Other status-based immunities have also been codified, *see, e.g.*, 19 U.S.C. § 1513 (immunity of customs officers), 42 U.S.C. § 14073 (immunity of employees of federal and state law enforcement agencies), without explicit language addressing the timing issue. Respondents' arguments, if applied to these statutes, would suggest that these statutory immunity protections would be lost if the status of the protected individual were to change before a judicial action is commenced. There is no reason to believe that Congress expected or intended such a result under these statutes or the FSIA itself.

Respectfully submitted,

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IN THE

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Petitioners,

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Respondents.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF CONSORTIUM DE RÉALISATION, CDR-ENTERPRISES, AND CRÉDIT LYONNAIS, S.A. IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF CONSORTIUM DE RÉALISATION, CDR-ENTERPRISES, AND CRÉDIT LYONNAIS, S.A. IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

This brief is submitted on behalf of Consortium de Réalisation ("CDR"), CDR Enterprises ("CDR-E"), and Crédit Lyonnais, S.A. ("Crédit Lyonnais").[1] The Republic of

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation and submission of this brief.

France (the "Republic") made the sovereign decision to rescue Crédit Lyonnais, a state-owned bank, from impending financial failure. To this end, in 1995 the Republic created CDR, a defeasance corporation similar to the U.S. Resolution Trust Corporation, to which the Republic transferred certain assets and liabilities of Crédit Lyonnais for orderly liquidation. CDR's shares are wholly owned by the Établissement Public de Financement et de Restructuration, a public administrative body and arm of the French State. CDR, in turn, has several wholly-owned subsidiaries, including CDR-E, which owns and manages for purposes of defeasance certain industrial interests formerly owned by Crédit Lyonnais. It is estimated that the Republic will spend approximately U.S. $20 billion in public monies as part of this defeasance operation.

As corporations established to carry out the Republic's sovereign decision to rescue and rehabilitate Crédit Lyonnais, CDR and CDR-E are in every sense of the word "instrumentalities" of the Republic and should be treated as such under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602–11 (2001). Each is currently a defendant in one or more civil actions in the United States, and each has relied on its status as an "agency or instrumentality" of the Republic to invoke the FSIA as a basis for federal jurisdiction. Both therefore have an interest in the first question presented: "Whether a corporation is an 'agency or instrumentality' if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation." *Dole Food Co. v. Patrickson*, 122 S. Ct. 2657 (2002).[2]

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[2] Not before the Court is the question of whether an entity that does not qualify as an "instrumentality" based on the majority ownership test nonetheless qualifies as an "organ" of a foreign state under the FSIA.

Crédit Lyonnais was privatized in 1999. It is a defendant in two civil actions in the United States that arise out of the same pre-privatization business transactions. One action was filed against Crédit Lyonnais before privatization, while the other was filed thereafter. In each action, Crédit Lyonnais has invoked its status as an "agency or instrumentality" of the Republic under the FSIA as a basis for federal jurisdiction. Crédit Lyonnais therefore has an interest in the second question presented: "Whether a corporation is an 'agency or instrumentality' if a foreign state owned a majority of the shares of the corporation at the time of the events giving rise to litigation, but the foreign state does not own a majority of those shares at the time that a plaintiff commences a suit against the corporation." *Id.*

Given the interests at stake, the *amici* file this brief with the full support of the Republic of France. The *amici* accordingly submit this brief in support of Petitioners and with the written consent of all parties. Letters of consent have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The questions presented in this case arise under the definitional section of the FSIA, 28 U.S.C. § 1603, and address whether certain types of entities are agencies or instrumentalities of a foreign state so that they can invoke federal jurisdiction under the FSIA, *see id.* at §§ 1330(a) and 1441(d), and the statute's related procedural protections.[3]

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[3] The FSIA contains procedural provisions governing, among other things, venue, service of process, and attachment, arrest and execution. *See* 28 U.S.C. §§ 1391(f) (venue), 1608 (service of process), 1609–11 (attachment, arrest, and execution). Some provisions of the FSIA, however, apply only to foreign states and not to their agencies and instrumentalities, such as the protection against punitive damages. *See id.* at § 1606. In addition, the service and venue provisions for agencies and instrumentalities resemble those for private corporations. *Compare id.* at

This case does not present the entirely separate question of whether an entity that qualifies as an "agency or instrumentality" is entitled to sovereign immunity under the FSIA.[4]

Considering "the statute's language, structure, subject matter, context, and history—factors that typically help courts determine a statute's objectives and thereby illuminate its text[,]" *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998)—the Court should answer both questions presented in the affirmative. The FSIA's definition of "agency or instrumentality" encompasses corporate entities a majority of whose shares are owned both directly and indirectly by a foreign state when litigation-creating conduct occurs, even if the entity is subsequently privatized. Not only is this construction consistent with the statutory text, purpose, and history, but it also recognizes that the strong sovereign interest in state-owned entities does not dissipate automatically because of tiered ownership or privatization. Accommodating this enduring sovereign interest lies at the heart of the FSIA and furthers the statute's purpose of promoting harmony in United States foreign relations by, among other things, providing a federal forum for civil claims against foreign states and their agencies and instrumentalities.

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§1391(f) (venue) *with* §1391(c) (venue) *and* § 1608(b)(2) (service) *with* Fed. R. Civ. P. 4(d)(3) (service).

[4] Because the FSIA's jurisdictional and procedural protections are separate and distinct from its grant of sovereign immunity, *see Maritime Int'l Nominees Estab. v. Republic of Guinea*, 693 F.2d 1094, 1105 n.18 (D.C. Cir. 1983), it would be erroneous to assume that answering the questions presented in the affirmative would unduly expand the number of entities obtaining immunity from civil suit in United States courts. Indeed, because many foreign state-owned entities become involved in United States litigation based on their commercial activities, such entities typically will not be immune from such civil claims. *See* Rebecca J. Simmons, Note, *Nationalized and Denationalized Commercial Enterprises Under the Foreign Sovereign Immunities Act*, 90 Colum. L. Rev. 2278, 2288 (1990).

ARGUMENT

I. CONSTRUING THE DEFINITION OF "AGENCY OR INSTRUMENTALITY" TO INCLUDE ENTITIES INDIRECTLY OWNED BY A FOREIGN STATE COMPORTS WITH THE FSIA'S LANGUAGE, THE COURT'S DESCRIPTION OF "OWNERSHIP" IN CORPORATE RELATIONSHIPS, THE FSIA'S PURPOSE AND THE CIRCUMSTANCES OF ITS ENACTMENT

A. The Statutory Text

The definition of "agency or instrumentality" is found at 28 U.S.C. § 1603, which provides in relevant part:

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof; and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Section 1603(b)(2) defines an "agency or instrumentality of a foreign state," in part, as a "separate legal person . . . a majority of whose shares or other ownership interest is *owned* by a foreign state or political subdivision thereof . . . ." *Id.*

(emphasis added). Resolution of the first question presented chiefly turns, therefore, on the meaning of the verb "owned" in the FSIA.[5]

On its face, the word "owned" is unqualified and is not defined in the FSIA. It neither expressly requires direct ownership nor prohibits indirect ownership. Consequently, it must be afforded its "ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). As the United States Court of Appeals for the Fifth Circuit observed, "The plain language of the statute simply requires 'ownership' by a foreign state. It draws no distinction between direct and indirect ownership; neither does it expressly impose a requirement of direct ownership." *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000). Interpreting "owned" in § 1603(b)(2) to mean only entities *directly* owned by a foreign state would therefore require the Court to read into the statute a limitation not imposed by Congress.[6]

B. The Court's Description of "Ownership" in Corporate Relationships

Courts describing the relationship between parent and subsidiary corporations have not restricted the meaning of

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[5] While *amici* concentrate their textual argument on the word "owned" in § 1603(b)(2), that provision also refers to "other ownership interest." The plain meaning of "ownership interest" is expansive, and shows that Congress cast its definitional net broadly in § 1603(b)(2) to encompass relationships between foreign states and entities well beyond the mere direct holding of shares by the state.

[6] The United States suggests that Congress's failure to use more elaborate language in § 1603(b)(2), such as "'owns or controls directly, or indirectly,'" means that the FSIA excludes from its purview entities indirectly owned by a foreign state. Brief for the United States (Nos. 01-593 & 01-594) ("Br. United States") 9. n.4 (quoting 15 U.S.C. § 1802(3)). The absence of such additional verbiage, however, says nothing about the meaning of the word "owned" standing alone, and does not support, let alone compel, the government's interpretation.

"ownership" to the direct holding by a parent of shares in its subsidiary. Indeed, this Court has described the ownership interests held by a corporate parent in its subsidiary as extending beyond the subsidiary's shares to include its assets. *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 607 (1945) (observing in a rate-making case involving natural gas producers that a parent corporation "owned the producing properties at the beginning of the transaction through one subsidiary; it owned them at the end of the transaction through another subsidiary").

Because the assets of a subsidiary include the shares it owns in subsidiary corporations, it is therefore not surprising that this Court also has described a corporate parent as the owner of the shares of a second-tier subsidiary held through a first-tier subsidiary. In *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co.*, 417 U.S. 703 (1974), BPO (a wholly-owned subsidiary of Bangor Punta) acquired 98.3% of the outstanding stock of BAR, a railroad. Commenting on the nature of the claims at issue (the substance of which are not relevant here), the Court described Bangor Punta as the "owner" of BAR even though Bangor Punta owned the BAR shares indirectly through BPO. *Id.* at 706. In addition to using the word "own" to describe a parent corporation's relationship to an indirectly held corporate subsidiary, the Court has, conversely, referred to both directly and indirectly owned government corporations as "instrumentalities" of the government. *See Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388–89 (1939).

Therefore, these decisions further illustrate that describing entities held by a foreign state through a corporate intermediary as being "owned" by that state for purposes of the FSIA is consistent with the ordinary, natural meaning of the word. *See Smith*, 508 U.S. at 228; *accord Williams v. Taylor*, 529 U.S. 420, 431 (2000).

C. The Purposes of the FSIA and the Circumstances of Its Enactment

Construing "agency or instrumentality" to include entities indirectly owned by a foreign sovereign through a tiered corporate structure also comports with and advances the underlying purposes of the FSIA and recognizes the circumstances of its enactment.

Congress enacted the FSIA in 1976 for the purpose of "comprehensively regulating the amenability of foreign nations to suit in the United States." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). From the Executive Branch's perspective, the FSIA was enacted "to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." Letter from Robert S. Ingersoll, Deputy Secretary of State, and Harold R. Tyler, Jr., Deputy Attorney General, to Carl O. Albert, Speaker of the House of Representatives (Oct. 31, 1975) *in* H.R. Rep. No. 94-1487, at 44, 45 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6634.

Such politicization occurred because the State Department was increasingly involved in deciding requests for foreign sovereign immunity under the pre-FSIA legal regime, during which the United States had adopted the "restrictive theory" of foreign sovereign immunity (granting immunity for sovereign acts but denying it for commercial acts) as a matter of Executive policy rather than national legislation. *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Phillip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 Dep't of State Bulletin 984, 985 (1952). Consequently, "foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Verlinden*, 461 U.S. at 487. Congress therefore enacted the FSIA, in part, to adopt

by statute the "restrictive theory" of immunity and to transfer the often thorny issue of foreign sovereign immunity from the political branches to the judiciary as a means of "reducing the foreign policy implications of immunity determinations, and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.

By the time Congress enacted the FSIA in 1976, the number of foreign state-owned corporations created to carry out sovereign tasks had grown dramatically, as had the potential for legal disputes between these entities and United States citizens. As the Court has observed, "[i]ncreasingly during this century, governments throughout the world have established separately constituted legal entities to perform a variety of tasks." *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 624 (1983). Foreign states use such corporate structures to accomplish governmental and commercial objectives, including the improved control of publicly owned enterprises, the integration of enterprises in certain industrial sectors, the management of enterprises in preparation for privatization, and the financial rescue of loss-producing enterprises. *See* Anjali Kumar, *The State Holding Company*, 187 World Bank Discussion Papers 11–12 (1992).

Indeed, scholars surveying the field six years *before* Congress enacted the FSIA elaborated on this point, noting in particular the use of multi-tiered public corporations by developing nations:

> [P]ublic enterprise, largely in the form of development corporations, has become an essential instrument of economic development in the economically backward countries which have insufficient private venture capital to develop the utilities and industries which are given priority in the national development plan. Not infre-

> quently, these public development corporations . . . *directly or through subsidiaries*, enter into partnerships with national or foreign private enterprises, or they offer shares to the public.

W. Friedmann, *Government Enterprise: A Comparative Analysis*, *in* Government Enterprise 333–34 (W. Friedmann & J.F. Garner eds., 1970) (emphasis added), *quoted in First Nat'l City Bank*, 462 U.S. at 625. As evidenced by *amici*, this phenomenon has not been limited to developing nations.[7]

When it enacted the FSIA, Congress was well aware of this widespread use of tiered corporate structures to carry out sovereign functions, and accounted for this phenomenon by defining the term "agency or instrumentality of a foreign state" to cover a wide range of entities:

> As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. Rep. No. 94-1487, at 15–16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.

Against this backdrop, Congress surely could have limited the scope of the FSIA to directly owned instrumentalities had it intended to so circumscribe the definition of "foreign state"

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[7] Indeed, the United States itself created and employed numerous multi-tiered public corporations in response to the Great Depression and World War II. *See Keifer & Keifer*, 306 U.S. at 390 ("Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of government in economic affairs have greatly extended the use of independent corporate facilities for governmental ends.").

in the statute. That Congress did not do so is telling, particularly since it took care elsewhere in the FSIA to delimit the scope of otherwise broad terms in precisely that manner. *See* 28 U.S.C. § 1605(a)(2) (providing for jurisdiction based on certain commercial activity that "causes a *direct* effect in the United States") (emphasis added).[8]

Construing the word "own" to include indirectly held subsidiaries of a foreign state, and thereby affording them the jurisdictional and procedural benefits of the FSIA, not only recognizes the circumstances surrounding enactment of the statute, but also recognizes the practical reality that the sovereign interest in state-owned corporate structures transcends the first tier of ownership. As the American Bar Association recently observed in connection with recommending reforms to the FSIA, "The strength of a foreign state's sovereign interests in an area does not necessarily dissipate when it employs more complicated legal structures resembling those used by modern private businesses." Working Group of the ABA, *Report: Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, 523 (2002) ("ABA Working Group"). This statement is as true for *amici* as it is for other multi-level state-owned entities. The

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[8] The United States argues unconvincingly that the definition of "agency or instrumentality" should be narrowly construed because Congress enacted the FSIA against the background "principle of separate corporate status." Br. United States 7. However, *United States v. Bestfoods*, 524 U.S. 51 (1998), on which the government principally relies, Br. United States 7–8, stands for the unremarkable proposition that the ownership of shares without more is not a proxy for corporate liability. *See* 524 U.S. at 61–62. In addition, interpreting the term "owned" in light of an entity's distinct corporate personality is redundant, if not irrelevant, under the FSIA, because the statute already requires an entity to demonstrate that it is "a separate legal person." 28 U.S.C. § 1603(b)(1). Whether a subsidiary of a foreign state-owned corporation is a "separate legal person" therefore adds nothing to the analysis of whether it is "owned" by the state.

Republic of France has an abiding interest in the operation of both CDR and CDR-E as part of a comprehensive defeasance structure established to carry out the financial rescue and rehabilitation of Crédit Lyonnais, plainly a sovereign undertaking.

Perhaps because Congress recognized this enduring sovereign interest in state-owned entities, it intended for the jurisdictional provisions of the statute to be construed broadly. "Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611; *accord id.* at 32, 6631 ("In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts."). As one federal Court of Appeals has recognized, "a liberal approach in implementing the FSIA's comprehensive jurisdictional scheme is most conducive to the FSIA's paramount objectives of keeping federal courts open to foreign states, and indeed of affirmatively encouraging private actions against foreign states to be adjudicated in federal court." *In re Texas Eastern Transmission Corp.*, 15 F.3d 1230, 1241 (3d Cir. 1994) (citations omitted).

In light of the foregoing, *amici* urge the Court to reverse the unduly narrow interpretation of § 1603(b)(2) of the FSIA adopted by the Ninth Circuit that limited the statute's reach to entities that are directly owned by a foreign state. *See* Pet. App. 20a–21a. This interpretation conflicts with the text, structure, purpose and background of the FSIA, and undervalues the strong sovereign interest in indirectly held public corporations created to accomplish state governmental and commercial objectives.

II. CONSTRUING THE FSIA TO INCLUDE ENTITIES THAT WERE STATE-OWNED WHEN LITIGATION-CREATING CONDUCT OCCURRED BUT WERE PRIVATIZED BEFORE SUIT IS FILED COMPORTS WITH THE STATUTORY TEXT AND THE COURT'S SOVEREIGN IMMUNITY JURISPRUDENCE AND FURTHERS THE PURPOSES OF THE ACT

A. The Grammatical Tense of the Definition of "Agency or Instrumentality"

The FSIA defines an "agency or instrumentality" to include an entity "a majority of whose shares . . . is owned by a foreign state." 28 U.S.C. § 1603(b)(2). Seizing on the use of the present tense in this definition, the Ninth Circuit expressed skepticism over whether entities that had been privatized by the time suit was filed could avail themselves of the procedural and jurisdictional provisions of the FSIA in litigation involving pre-privatization events. *See* Pet. App. 17a–18a. This concern, shared by the Solicitor General, *see* Br. United States 15, is misplaced.

Use of the present tense in defining "agency or instrumentality" simply does not require that an entity be state-owned when an action is commenced against it. The definitional use of the present tense is timeless and does not control when an entity must exhibit the characteristics of an instrumentality to effectuate the purposes of the FSIA. *See, e.g., Coalition for Clean Air v. Southern Cal. Edison Co.*, 971 F.2d 219, 225 (9th Cir. 1992) (observing that in construing congressional intent "[t]he present tense is commonly used to refer to past, present, and future all at the same time"). The language of § 1603(b)(2) certainly does not foreclose applying the FSIA to entities that were state-owned at the time of the underlying conduct, even if the entities were subsequently privatized.

Indeed, every federal Court of Appeals to have considered the issue has ruled that an entity that was majority state-owned when the conduct giving rise to the litigation occurred is entitled to the benefits and protections of the FSIA. *See Peré v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480–81 (5th Cir. 1998); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1381–82 (8th Cir. 1993); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 449–50 (6th Cir. 1988). As the United States Court of Appeals for the Eighth Circuit observed, the present tense used in § 1603(b)(2) can "speak to a variety of situations, including the time of the alleged wrongdoing." *General Elec. Capital Corp.*, 991 F.2d at 1381 (citation omitted). The correctness of this view is confirmed by the Court's sovereign immunity jurisprudence.

B. The *Western Maid* Case

This Court's jurisprudence has recognized the principle that the sovereign character of an entity survives its privatization for purposes of immunity for pre-privatization conduct. *In re The Western Maid*, 257 U.S. 419 (1922). In that case, two ships were leased or chartered to the United States and used for public purposes during wartime. After the ships were returned to their private owners, claims were brought against the ships for damages caused by collisions that occurred while the ships were in government service. This Court, speaking through Justice Holmes, found that the vessels were immune from suit due to their status at the time of the relevant conduct. *Id.* at 432–33. Put differently, because of the sovereign character of the vessels at that time, they were entitled to the then prevailing benefit of absolute immunity from suit regardless of their subsequent transfer into private hands. *See Calmar S.S. Corp. v. United States*, 345 U.S. 446, 452 (1953) (describing the principal issue in *The Western Maid* as "whether an enforceable liability could have been created when those two vessels passed into private ownership, although no such liability arose when the

collisions occurred"). Similarly, if an entity is an instrumentality of a foreign state when it engages in litigation-creating conduct, it should be entitled to invoke the procedural and jurisdictional benefits and protections of the FSIA regardless of whether it is later privatized.

C. The Abiding Sovereign Interest in Privatized Entities

In construing the FSIA, it should be recognized that there is an abiding sovereign interest in the judicial treatment of a former state-owned entity. If a former state-owned entity is sued based on pre-privatization conduct, the propriety of conduct performed under the aegis of the state is being scrutinized. Judicial scrutiny of such conduct implicates the same foreign policy concerns that animated the passage of the FSIA. *See, e.g., Peré*, 150 F.3d at 481 ("The foreign policy concerns underlying sovereign immunity do not necessarily disappear when a defendant loses its foreign status before suit is filed."); *General Elec. Capital Corp.*, 991 F.2d at 1381 ("The foreign policy concerns discouraging us from judging the acts of another nation are not necessarily eliminated because an entity is not a foreign state at the time of suit."); ABA Working Group, 40 Colum. J. Transnat'l L. at 530 ("[A]ctions of foreign states remain politically sensitive even after the entity is sold or otherwise loses its status as a foreign state or instrumentality."). In commenting on the timing issue, the Ninth Circuit recognized, but seriously undervalued, this important sovereign interest. *See* Pet. App. 18a.

The abiding state interest in privatized entities also frequently implicates the public fisc of the foreign sovereign. In this regard, privatization agreements often contain indemnification clauses that require the foreign state to indemnify the now private entity against certain liabilities arising from pre-privatization conduct. *See Cargill Int'l S.A.*

v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993) (acknowledging that in the process of privatization "the foreign state may remain financially responsible for any judgments won against a former state-owned entity, especially where the acts at issue occurred when the entity was still under government control"). Nor is this an exclusively foreign phenomenon. For example, the United States itself has made indemnification commitments in the privatization of its interests. *See* United States Enrichment Corp. Privatization Act, 42 U.S.C. § 2297h-7(a)(1) (providing for continuing liability of the Secretary of Energy for pre-privatization conduct). This is precisely the situation faced by *amici*, because the Republic of France has remained financially responsible for certain pre-privatization conduct of Crédit Lyonnais.[9]

As one commentator has observed, privatization has been "the dominant international economic trend" over the past decade. ABA, *Introduction: Privatization—The Global Scale-Back of Government Involvement in National Economics*, 48 Admin. L. Rev. 435, 435 (1996). Given this trend, denying the benefits and protections of the FSIA to privatized entities in cases involving pre-privatization conduct could adversely affect many former state owners. Such a ruling also would disturb the settled expectations of foreign states based on the uniformity of decisional law generated by the Courts of Appeals on the timing issue,[10] *see*

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[9] The existence of such sovereign financial commitments substantially undermines the Ninth Circuit's assumption that litigation against privatized corporations does not directly implicate sovereign interests. *See* Pet. App. 18a ("Nor will American courts necessarily have to worry about ordering a foreign state to pay money to a private litigant.").

[10] In contrast, applying the FSIA to formerly state-owned entities would not frustrate the settled expectations of private plaintiffs. Where a claim involves pre-privatization conduct, the plaintiff would have actually dealt with a foreign state-owned entity. As a result, a trial of the plaintiff's claim in federal court under the FSIA procedures against the

Pet. App. 17a, and would therefore risk creating the very friction in foreign relations that the FSIA was designed to avoid.

For these reasons, the Court should construe the FSIA as applying to an entity that was an "agency or instrumentality" when the conduct occurred that gives rise to the litigation.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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August 23, 2002

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now privatized entity would afford the plaintiff those same rights to which the plaintiff was entitled when the events occurred underlying the litigation.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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Nos. 01-593 & 01-594

IN THE

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DOLE FOOD COMPANY, *et al.*,
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v.

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Respondents.

DEAD SEA BROMINE CO., LTD., *et al.*,
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GERARDO DENNIS PATRICKSON, *et al.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICI CURIAE* OF THE REPUBLIC OF IRELAND AND ICAROM PLC (UNDER ADMINISTRATION) IN SUPPORT OF PETITIONERS

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BRIEF *AMICI CURIAE* OF THE REPUBLIC OF IRELAND AND ICAROM PLC (UNDER ADMINISTRATION) IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE* [1]

In 1985, the Republic of Ireland acquired what was then a privately-held insurer known as The Insurance Corporation of

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[1] Counsel for the parties in these actions have consented to the filing of this brief, and those consents have been filed with the Clerk of this Court. No counsel for either party had any role in authoring this brief, and no person other than the named *amici* and their counsel made any monetary contribution to the preparation and submission of this brief.

Ireland plc ("ICI"). At the time of the acquisition, ICI, one of Ireland's largest insurers, was insolvent, and the Irish government feared that its failure would also lead to the collapse of ICI's then parent, Allied Irish Banks ("AIB"), one of Ireland's premier banks. The government's intervention to acquire ICI and relieve AIB of the financial burden that ICI represented was calculated to avert severe damage to the Irish insurance and banking systems and, ultimately, to the stability of the Irish economy. This brief is filed on behalf of *amici curiae* the Republic of Ireland and its wholly-owned instrumentality Icarom plc (Under Administration) ("Icarom"), which ICI was renamed in 1990. Icarom now operates solely in run off.

The interests of the Republic of Ireland and Icarom stem from the latter's involvement in insurance coverage litigation in the United States. From the early 1970's until 1990, in addition to writing domestic insurance in Ireland, ICI was an active participant in the London insurance market and subscribed to a number of insurance policies for North American insureds. As such, ICI (and Icarom as its successor) is a frequent defendant in coverage actions brought by those insureds in American courts. In a number of instances where an action has been filed in state court, ICI/Icarom has removed the case to federal court pursuant to the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602, *et seq.*, on the basis of the Republic of Ireland's ownership.

As discussed more fully below, the Republic of Ireland chose to structure its ownership of ICI/Icarom through a holding company. Thus, the issue of whether ICI/Icarom qualifies as an "agency or instrumentality" under the FSIA arises frequently in these coverage actions. Recently, Icarom was denied access to federal court in two actions that arose within the Ninth Circuit's jurisdiction on the basis of that circuit's bright-line rule against jurisdiction for tiered entities.

EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co., 257 F.3d 992 (9th Cir. 2001); *Browning-Ferris Indus., Inc. v. Lexington Ins. Co.*, No. 02-643, slip op. (D. Ariz. June 12, 2002). On the same facts, however, courts in other circuits have determined that the Republic of Ireland's ownership does qualify Icarom as the government's instrumentality and entitles Icarom to federal jurisdiction. The latest decision to so rule is *Fortis Insurance Ltd. v. Browning-Ferris Industries, Inc.*, No. H-02-1226, slip op. (S.D. Tex. June 26, 2002).[2]

The Republic of Ireland and Icarom have an interest in this Court's resolution of the question of whether tiered ownership is permissible under the FSIA, since it may directly affect currently pending cases in which Icarom is a party. In addition, it may affect Icarom's future ability to remove cases to federal court. Accordingly, the Republic of Ireland and Icarom file this brief to put before the Court their factual circumstances and to urge the Court, for reasons in addition to those set forth in the Petitioners' briefs, to construe the FSIA in a manner that permits tiered ownership.

SUMMARY OF ARGUMENT

There is a wide range of circumstances that can lead a foreign government to use a tiered ownership structure for entities in which it has a vital proprietary interest. A combination of Irish legal requirements and emergency economic conditions led the Republic of Ireland to use a shell corporation to act as its nominee in holding legal title to ICI. This structure cannot obscure, however, that the Irish government has 100% of the beneficial ownership of that company.

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[2] The district court's opinion is not yet published. A copy is contained in the Lodging Material of *Amici Curiae* the Republic of Ireland and Icarom plc (Under Administration) In Support of Petitioners.

Under the FSIA's plain language, a foreign sovereign's "agency or instrumentality" qualifies for the statute's procedural protections whether it is owned directly by the sovereign or indirectly through another of the sovereign's agencies or instrumentalities. This interpretation follows from (i) the statute's express definition of the term "foreign state" as including its "agency or instrumentality," and (ii) the use of the undefined terms "owned" and "ownership interest" to extend the statute's reach to a broad array of proprietary interests, legal and beneficial, direct and indirect.

The statute's underlying purpose is to protect the foreign relations interests of the United States by providing more uniform treatment in resolving disputes in which foreign sovereigns have proprietary interests, achieved by channeling such disputes into the federal courts. This purpose requires that the statute be construed to reach all entities in which a foreign sovereign has a genuine majority ownership interest, however that interest may be structured. A formalistic approach that would automatically exclude from FSIA protection any entity that is owned by a foreign sovereign through a tiered structure is destructive of that core purpose. The district courts should determine whether an entity qualifies for FSIA protection based on the substance of the foreign sovereign's ownership interest and not by application of a rigid rule against tiering.

ARGUMENT

Beginning with *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), the Ninth Circuit has refused to accord FSIA status to tiered entities. In the case at bar (*Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3798 (2002)), the Ninth Circuit ruled that the manner in which the Israeli government structured its ownership interests in the Dead Sea companies disqualifies them from treatment as state-owned instrumentalities under

the FSIA. In *EOTT Energy*, the Ninth Circuit reached the same conclusion regarding the Republic of Ireland's ownership of Icarom. In each instance, the circuit court's ruling cannot be squared with the plain language of the statute and, moreover, is at war with the statute's underlying purpose. This Court should reverse.

I. ICAROM IS A COMPELLING EXAMPLE OF AN INSTRUMENTALITY THAT IS 100% OWNED BY A FOREIGN GOVERNMENT NOTWITHSTANDING THE FACT THAT LEGAL TITLE TO ICAROM'S SHARES IS HELD BY NOMINEES.

There are a huge variety of circumstances in which foreign governments choose to tier their ownership of entities in which they have a genuine, even vital, proprietary interest. As one commentator has noted, the Mexican government has long had a vital national interest in its oil industry, its major source of foreign exchange. That interest did not diminish when, in 1982, Mexico decided to restructure its ownership of what had been a single national petroleum company into a holding company with four subsidiaries.[3] This Court should therefore be careful in construing the FSIA to take into account not only the fact pattern presented in *Patrickson* but the wide array of ways in which foreign governments may structure their ownership interests. The Irish government's ownership of Icarom provides a useful fact pattern against which the statute can be measured. As we shall show, the Republic of Ireland, as beneficial owner of Icarom, indisputably holds 100% of the proprietary interest in that company notwithstanding that in structuring its ownership it

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[3] Joseph W. Dellapenna, *25th Anniversary of the Foreign Sovereign Immunities Act: Refining the Foreign Sovereign Immunities Act*, 9 Willamette J. Int'l Law & Dispute Resolution 57, 89 (2001).

chose to use a shell corporation whose only function is to act as its nominee in holding bare legal title to Icarom's stock.

Icarom is thus not some remote entity in which the Irish government happens to have a commercial interest. The government did not acquire ICI in order to generate commercial profits from the business of insurance. Rather, the government acted to salvage ICI when it became insolvent. It did so for the stated purpose of protecting the Irish economy from the risk of collapse that the government feared could ensue from the financial failure of one of the country's largest insurers and the threat this posed to its parent, the country's premier commercial bank. The structure of that acquisition, in turn, was dictated by requirements of Irish law in combination with the government's perception that speed and initial secrecy were essential to the acquisition.[4]

A. ICI's Background and Later Insolvency

ICI was incorporated as a limited liability company in 1935, in Dublin, Ireland. In its early years, ICI primarily concentrated on Irish non-life insurance business. The company rapidly grew to become the largest liability and marine insurer in Ireland. In the 1970's, ICI expanded its operations into foreign markets, including the London insurance market.

In 1981, AIB acquired 25% of ICI's stock. Two years later, AIB purchased the remaining ICI shares and assumed full control of the company. Shortly after the acquisition,

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[4] Facts pertinent to the Republic of Ireland's ownership of Icarom are drawn from the record in *Fortis Insurance* and *USX Corp. v. Adriatic Insurance Co.*, No. 95-866 (W.D. Pa. removed June 7, 1995), and in particular from the Republic of Ireland's Certification of Ownership, discussed more fully at pp. 9-10 *supra*. A copy of the Certification of Ownership is included among the material lodged with the Court by these *amici*.

however, AIB discovered that ICI's financial position had deteriorated, due in large part to losses associated with its London business. In late 1984, AIB injected IR£40 million of capital into ICI to shore up its operations. However, this investment proved insufficient to rehabilitate ICI. Upon further investigation, AIB determined that there were additional deficiencies that made ICI's continued viability questionable and learned that ICI could not estimate with any degree of certainty the extent of its losses. It eventually became painfully clear that the restoration of ICI to full health would require major additional funding.

B. The Irish Government's Response to the Impending Economic Crisis

In early 1985, AIB informed the Irish government of ICI's precarious financial condition. Given the enormity of ICI's losses and the amount of money likely to be needed to put the company on sound financial footing, the Irish government quickly recognized that AIB was incapable of funding ICI's liabilities without putting its own solvency in jeopardy. Since AIB was the largest bank in Ireland and ICI was the leading insurer to corporate Ireland, the Irish government had grave concerns about what might happen to the Irish insurance and banking systems and, in turn, to the Irish economy if information concerning ICI's financial condition became public with no solution to the impending crisis in place.

"To avoid [ICI's] collapse and to minimise as far as possible the general economic repercussions that might arise therefrom," the Irish government reached the decision on March 15, 1985, to take emergency action.[5] Its solution was to acquire ICI from AIB, relieve AIB of the exposure that ICI represented to its own financial condition, and have the public

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[5] Republic of Ireland Certification of Ownership, Lodging Material at 20.

treasury serve as the source of funds of last resort in the rehabilitation of ICI. Since the goal of the acquisition was to maintain the stability of the insurance and banking systems in Ireland, the government wanted it to be immediately clear to the public that AIB no longer had responsibility for the liabilities of ICI and that the government, not AIB, would assure that ICI would not default on its insurance obligations. Thus, the government acted to complete its acquisition of ICI by the end of the St. Patrick's Day weekend when the financial markets would reopen.

To effectuate the transfer in the quickest and quietest manner possible, the government used a "shelf" company, Gebhard Limited, controlled by the Minister for Industry, Trade, Commerce and Tourism ("Minister"), through which to acquire the shares of ICI from AIB. Subsequently, the Irish Parliament enacted legislation that specifically authorized the Minister to acquire ownership of ICI through Sealuchais Arachais Teoranta ("SAT"), the new name for Gebhard Limited. This legislation, entitled the "Insurance (Miscellaneous Provisions) Act 1985" (the "1985 Act"), made the transfer of ICI's shares to SAT retroactive to March 15, 1985.

C. The Structure of the Government's Ownership of ICI

The threatened economic crisis that led the Irish government to acquire ICI also influenced the ownership structure that the government elected to use for the acquisition. Initially, the government acquired ICI through Gebhard Limited, a pre-existing shell company controlled by solicitors acting for the Irish government. After securing control, the government could act more deliberately in the passage of special legislation authorizing this shell, renamed SAT, to serve as the holding company nominee for the Minister.

Under Irish law, ICI was required to have at least seven shareholders in order to maintain its status as a public limited company ("plc"). Accordingly, the government caused legal title to six of ICI's shares to be issued to senior civil servants, who hold them in trust for the Minister. SAT took legal title to the remaining 139,999,994 shares of ICI as a holding company nominee for the benefit of the Minister. Under Irish company law, a company that is not a plc must have at least two shareholders. Two high-ranking civil servants therefore agreed to hold legal title to the only two issued shares of SAT in trust for the Minister. The terms of the trusteeship under which the two civil servants hold the shares of SAT are set forth in the 1985 Act, which also establishes that control over the trustees rest with the Minister. For example, the shareholders of SAT, who are also its directors, are appointed by and may be removed by the Minister, after consultation with the Minister for Finance. The directors of SAT hold their positions on terms and conditions set by the Minister in consultation with the Minister for Finance. In the event of the death or retirement of a director, his share automatically vests in the Minister without the necessity for transfer. Any dividend received on account of the shares of SAT must be paid to the Minister for the benefit of the Exchequer.

The Republic of Ireland has officially confirmed its ownership of Icarom when the issue has arisen in jurisdictional disputes. In an insurance coverage action pending in district court for the western district of Pennsylvania[6], the current Minister for Enterprise, Trade and Employment[7], the Honorable Mary Harney, provided a Certification of Ownership, duly authenticated by the U.S.

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[6] *USX Corp. v. Adriatic Ins. Co.*, No. 95-866 (W.D. Pa. removed June 7, 1995).

[7] The name of the Department of Industry, Trade, Commerce and Tourism was changed in 1992 to the Department of Enterprise, Trade and Employment.

Vice Consul in Ireland, formally declaring the government's assertion of ownership of ICI and now Icarom. Icarom subsequently filed the same Certification in the southern district of Texas, and it was the basis for that court's recent decision in *Fortis Insurance* recognizing Icarom's status as an instrumentality of the Irish government. As stated in the Certification, the responsible government Minister "continue[s] in full ownership of ICAROM plc, in a manner consistent with the Irish Law." [8]

Under this ownership structure, all the shares of Icarom are held for the benefit of the Minister and she, as the personification of the Irish state, is the beneficial and equitable owner of 100% of Icarom. Given its 100% beneficial interest, the Irish government's ownership is not indirect in any sense pertinent to the statutory scheme. The holding company and civil servants are not true intermediaries even in the sense of an operating company that owns subsidiaries but are instead merely nominees whose sole function is to hold legal title to ICI's stock for the government's benefit. Only by exalting form over substance could ICI be deemed an inappropriate entity for "instrumentality" treatment under the FSIA.[9]

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[8] As the circuit court observed in *S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411, 415 (2d Cir. 1983), "statements of foreign officials . . . have been accorded great weight in determining whether an entity is entitled to claim the protection of the FSIA." *See Fortis Ins. Ltd. v. Browning-Ferris Indus., Inc.*, No. H-02-1226, slip op. at 6 n.8 (S.D. Tex. June 26, 2002); *Outboard Maritime Corp. v. P.T. Indonesian Consortium of Constr. Indus.*, 582 F. Supp. 1136, 1143-44 (D. Md. 1984).

[9] In *USX*, in addition to challenging the analysis of tiered ownership championed by *Gates* and its progeny, Icarom contends that: (i) by virtue of the Irish government's 100% beneficial interest, it is directly owned by the government and not indirectly owned through a true intermediary; and (ii) because the government acquired it in order to rescue the Irish economy, it qualifies in any event as an organ of the government. Plainly,

II. THE STATUTE'S PLAIN LANGUAGE SUPPORTS EXTENDING FSIA PROTECTION TO MAJORITY-OWNED ENTITIES, WHETHER HELD DIRECTLY OR INDIRECTLY.

In *EOTT Energy*, the Ninth Circuit adhered to the inflexible rule against tiered ownership that it had laid down in *Gates* and followed in *Patrickson*, holding that Icarom is not majority-owned by the Republic of Ireland. Contrary to the Ninth Circuit's thesis, the FSIA's majority-ownership requirement does not purport to direct exactly how a state instrumentality must be owned. The requirement is a functional and practical measure of the extent of a foreign government's proprietary interest in an entity. It is not a rigid blueprint that dictates to foreign governments how to legally structure their sovereign affairs. It expressly does not specify the type of ownership interest that must be held. It does not limit ownership to holding legal title to the instrumentality's stock. It does not prohibit ownership through intermediaries. Rather, the statute simply requires that the foreign state own a "majority" interest in the entity, whether that interest is held through "shares" or through some "other ownership interest." 28 U.S.C. § 1603(b)(2). As the Fifth Circuit correctly observed in *Linton v. Airbus Industrie*, 30 F.3d 592, 598 n.29 (5th Cir. 1994), the FSIA "erects no explicit bar to the methods by which a foreign state may own an instrumentality."

One of the more perplexing aspects of the Ninth Circuit's analysis is its assertion that a prohibition against any tiered ownership is required by the literal language of the statute and its insistence that Congress should have used other language if it meant to allow indirectly-owned entities to

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a purely commercial entity can be government-owned without being an organ, and an entity can perform functions that qualify it as an organ without it being government-owned. Icarom is both.

qualify as agencies or instrumentalities. In fact, the plain language of §1603 dictates that an agency or instrumentality of a foreign sovereign may be owned by another agency or instrumentality of that sovereign, and Congress did not need to use other language to achieve this result.

First, and foremost, the words "foreign state" constitute a defined term in the statute. No interpretation is required to so conclude. The term is bracketed by quotation marks and is expressly listed as such under the provision entitled "§1603(a). Definitions." That section unambiguously provides that "for purposes of this chapter," the defined term "foreign state" shall be deemed to "include" both a "political subdivision" and an "agency or instrumentality" of that state. 28 U.S.C. § 1603(a). The sole exception, again expressly, is §1608, a provision dealing with service of process and other procedural matters not pertinent to the issue here presented. There and there alone, the statute says that the term "foreign state" when used in combination with the term "political subdivision" is meant to exclude any "agency or instrumentality." In all other instances, the more inclusive statutory definition of "foreign state" contained in §1603(a) applies. Hence, when the defined term "foreign state" appears in the very next subsection, §1603(b)(2), it must be read expressly to "include" an "agency or instrumentality." An "agency or instrumentality" is therefore defined as "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state," which, in turn, "includes" its "agencies and instrumentalities." 28 U.S.C. § 1603(b)(2). Thus the statute's plain reading is that direct ownership by the foreign government itself is not required. FSIA status extends as well to those agencies and instrumentalities majority-owned by other agencies or instrumentalities of the foreign government.

Second, the statute nowhere expresses the notion that indirect ownership does not qualify for FSIA treatment.

There are no such words in the statute. To the contrary, the only express requirement is that the foreign state must hold the majority ownership interest in the entity, without distinction as to whether it be direct or indirect. To be sure, there are statutes that for clarification or emphasis add the phrase "directly or indirectly" to indicate the breadth of a term or concept, but that phrase is hardly mandatory in order for courts to give a statute an equivalently broad construction. The Ninth Circuit improperly takes the statute's silence as a directive to engraft the opposite phrase—"directly but not indirectly"—on the statutory language. But the statute itself uses no such phrase.

In the face of the statutory language that says that the term "foreign state" is one of the statutory "definitions," the Ninth Circuit's insistence that it is not is indefensible. In the face of the statutory command that the term shall be used as defined for all purposes in the FSIA, except for the one express purpose of service of process, the Ninth Circuit's decision to broaden the exception to other circumstances, unexpressed in the statute, is untenable. In support of its rewriting of the statute, the Ninth Circuit makes two points, neither of which withstands analysis.

First, the court stresses that Congress used the word "includes" when it incorporated a political subdivision and an agency or instrumentality into the term "foreign state" rather than use the word "means." *Gates*, 54 F.3d at 1462. But this choice of words hardly transforms what Congress explicitly called a "definition" into a non-definition. Use of the word "means" would have been appropriate had Congress endeavored to supply a complete list of all entities that fall within its defined term, but Congress did not choose to do it that way. For starters, the inclusion of the foreign sovereign itself and the sovereign's central government are both left implicit. The use of the word "includes" makes clear that, regardless of whatever else the term might encompass,

"foreign state" expressly extends to a foreign sovereign's agencies and instrumentalities.

Congress' use of "includes" to set forth a definition is common in many statutes. It is even used elsewhere in the FSIA. In 28 U.S.C. § 1603(c), in defining the "United States" for purposes of the statute, Congress specified that the term "includes all territory and waters, continental or insular, subject to the jurisdiction of the United States." Surely this choice of "includes" rather than "means" would not leave a court free to limit the phrase in other sections of the statute to territorial land and not territorial waters. If anything, the word "includes" is more expansive than the word "means" when used in a definition, since it leaves the courts room to enlarge upon the enumerated list with other similar instances. However, it does not permit a court to exclude expressly listed instances, as the court below has done.

Second, the sole reason the Ninth Circuit gives for its gloss on the statutory definition—its perceived need to avoid surplusage—also does not hold up to close inspection. *Gates* argues that if the term "foreign state" in all instances includes an "agency or instrumentality," it must perforce also include a "political subdivision," making the express addition of "political subdivision" in §1603(b)(2) unnecessary. 54 F.3d at 1462. The flaw in the *Gates* analysis is its transformation of a tool of statutory construction into a rule of law. To be sure, it is usually appropriate to construe statutes so as to avoid redundancies. But as this Court has emphasized, canons of construction are no more than rules of thumb which sometimes must yield to the cardinal canon of construction, that the Congress is presumed to say what it means and mean what it says. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("[r]edundancies across statutes are not unusual events in drafting"). The Ninth Circuit ignored this principle in *Gates* which in other settings it, too, has recognized. *See, e.g., Cool Fuel, Inc. v. Board of*

Equalization, 210 F.3d 999, 1005 (9th Cir. 2000) ("rigid adherence" to rule against redundancy "must yield" when it would "require disregard of clear indications to the contrary" (quoting *United States v. Zacks*, 375 U.S. 59, 69 (1963))).

Here, application of the rule would be contrary to the unambiguous statutory command that for all purposes save one, the term "foreign state" shall include its "agency or instrumentality." The *Gates* reading would erect a second exception, flatly contrary to what the statute says. As the Seventh Circuit recognized, in deciding whether to accept an arguable redundancy or to impose a construction that clearly conflicts with a clear statutory command, the redundancy must be tolerated. *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932, 940-41 (7th Cir. 1996); *see also, Parex Bank v. Russian Sav. Bank*, 81 F. Supp. 2d 506, 508 (S.D.N.Y. 2000). It is not for the courts to tidy up poor statutory drafting at the cost of Congressional intent.

The Ninth Circuit unfortunately ignores other important statutory language bearing on the issue. In establishing its ownership-interest test, Congress recognized that a foreign government's interest, whether in a corporate or non-corporate entity, could be held through "shares" or some "other ownership interest." It is telling that Congress used the words "owned" and "ownership" in the statute without defining them. *See* 28 U.S.C. §1603(b)(2). Just as this absence of definition of these words permits a broader, more flexible construction, the disjunctive phrase that joins a particular instance ("shares") with the general category ("other ownership interest") is expansive, not limiting. *See id.* Plainly, the form of "ownership," whether the entity is "corporate" or non-corporate ("otherwise"), is not restricted to "shares." [10] Given the vast array of forms of ownership

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[10] Contrary to the Ninth Circuit's suggestion in *Patrickson*, 251 F.3d at 807, the term "other ownership interest" is not tied solely to non-corporate ("otherwise") entities like partnerships. Just as the statute refers to non-

that the hundreds of different foreign governments with widely disparate legal systems could potentially use, declining to provide a fixed statutory definition of these words is not surprising, and the Ninth Circuit was wrong in insisting upon a limited definition.

In sum, on plain reading, the statute does not distinguish between legal and beneficial ownership, nor between ownership of a corporate entity through shares or through other ownership interests, nor between direct and indirect ownership. By definition, it expressly permits an agency or instrumentality to be owned by another agency or instrumentality. The Ninth Circuit's conclusion to the contrary, based solely on a concern about surplusage, cannot be sustained.

III. THE STATUTE'S UNDERLYING PURPOSE WOULD BE DISSERVED BY REQUIRING A BRIGHT-LINE DISTINCTION BETWEEN DIRECT AND INDIRECT OWNERSHIP.

We do not wish to be understood to discard the Ninth Circuit's concerns regarding plain language. There is a genuine issue of surplusage, and to that extent the statute could be clearer. Rather, we fault the Ninth Circuit for insisting that it has found the correct plain reading of the statute when its reading fails even more than its alternative to account for the full statutory text. To the extent that ambiguities persist after a plain reading of a statute, and the various rules designed to aid construction are inconclusive or in conflict, the touchstone for interpretation must be the nature of the statute itself. No statute should be read in a vacuum. Its underlying object or fundamental purpose must

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corporate ("otherwise") entities held by "shares" (*e.g.*, partnership shares or shares in a joint stock association), so, too, does it expressly contemplate that a "corporate" entity can be held by an "other ownership interest." 28 U.S.C. § 1603(b).

inform its construction. Yet it is here especially that the Ninth Circuit's analysis stumbles. More troubling than the flaw in their linguistic analysis is the damage that *Gates* and its progeny would inflict on the FSIA's core purpose: to protect the foreign relations interests of the United States by minimizing the chance for confrontations with foreign governments that might arise by exposing them to the potential vicissitudes of state court justice and jury verdicts. It is not comity but uniformity of treatment which the FSIA seeks to promote.[11] Under the FSIA's approach, the key to promotion of good foreign relations in respect to litigated controversies is in assuring uniformity of treatment from nation to nation by placing their matters in the hands of the federal judiciary. Recognizing the many ways in which foreign governmental interests may be involved in a litigation controversy, Congress chose to describe broadly what constitutes a "foreign state" for purposes of the statute. Congress thus intended the FSIA to extend procedural protection to a wide array of entities in which a foreign government has a majority proprietary interest, and the

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[11] Unfortunately, the Solicitor General's brief in support of certiorari misses this point. Noting that foreign jurisdictions generally do not grant immunity-based protections to government-owned entities at all unless they engage in sovereign acts, the Solicitor General suggests that extending such protection to subsidiaries would be even less reciprocated abroad. Brief at 11. Yet this very observation – that foreign jurisdictions do not typically grant protection even to directly government-owned commercial entities—underscores that the FSIA is not so much about comity as about uniformity. However foreign courts choose to treat U.S. government-owned commercial entities, Congress has determined to provide foreign government-owned counterparts not with immunity but with the uniform treatment that access to federal courts provides.

courts are accordingly obliged to construe the law broadly to achieve this end. As the legislative history of the statute shows:

> [E]ntities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.

A broad construction of such statutory terms as "foreign state," "agency or instrumentality," "ownership interest," and "owned," is particularly essential given the enormous diversity of foreign governments and systems of laws which the statute can be expected to reach. It would be the very antithesis of what the law seeks to achieve to adopt a narrow and parochial view of how the FSIA permits a foreign government to structure the entities in which it has a vital interest and still be eligible for FSIA treatment. Indeed, allowing the ownership structure required by the legal system of one foreign state to qualify while denying another's simply because, as with ICI, legal title is held by a nominee, would be calculated to accomplish the exact opposite of the statute's stated goal of uniformity of treatment and reliable access by foreign sovereigns to a unitary system of federal courts. As the legislative history observes, "broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." *Id.* at 6611.

It is in this context and not against the backdrop of what a court might regard as black-letter principles of U.S. corporate law that the FSIA must be interpreted. The notion that it is U.S. domestic jurisprudence on corporate organization and ownership that must inform how the FSIA is interpreted is hardly self-evident. The FSIA was not enacted to establish or even necessarily to reflect positive principles of corporate law, such as rules of limited liability, separateness of the corporate entity from its shareholders, consolidation of financials of related corporate entities, or the like. U.S. corporate law is thus not the appropriate model against which to measure the reach of the FSIA's majority ownership test.

ICI is a perfect illustration. As a matter of Irish law, the government could not be the sole legal owner of ICI with direct title to all of its shares, because a minimum of seven shareholders was required to maintain ICI's status as a public limited company. To be sure, as a strict legal matter, the Minister could have held legal title to all but six of ICI's shares, as the government typically does when it owns and operates commercial ventures, but the government never intended its ownership of ICI to represent a commercial venture opportunity. Because of the extraordinary economic circumstances that led to the ICI acquisition, other important Irish public policy considerations counseled a different structural approach. It was the prospect of an economic crisis arising from ICI's and, potentially, AIB's insolvency that caused the government to move quickly and quietly to secure control over ICI while the Irish financial markets were closed and, in turn, that led to use of a pre-existing shell corporation to acquire most of ICI's shares, which action was later retroactively authorized by the passage of the 1985 Act. This is the essence of sovereign discretion. For a court to hold that this ownership structure, dictated by Irish law and the perceived need for speed and secrecy, cannot qualify for the protection of the FSIA, notwithstanding that the government holds a complete beneficial interest, while another foreign

state's direct legal ownership of a mere 51% interest in a commercial operation would enjoy all the law's procedural benefits, is indefensible.

Seemingly oblivious to what the FSIA attempts to accomplish, *Gates* and its progeny assert that according foreign state status to indirectly majority-owned commercial entities would considerably expand the FSIA's protection "far down the line" of a corporate chain. *See, e.g, Gates*, 54 F.3d at 1462. Yet the Ninth Circuit recites no examples of circumstances in which second or lower-tier companies might be afforded FSIA protection when to do so would somehow be inappropriate. Indeed, it even acknowledges that "such a broad view of sovereign immunity may very well be desirable." *Id.* The short answer is that in determining whether an entity is too remote from the foreign sovereign, Congress did not set a direct-versus-indirect test but a majority-owned test. The mere fact that a foreign government decides to hold legal title to all of a company's shares though one or more intermediaries rather than directly does not lessen the government's true interest.

Similarly, the *Gates* observation that according foreign state status to commercial entities that are indirectly majority-owned by a foreign state unduly accords them competitive advantages just begs the question. Congress expressly chose to provide certain procedural protections to entities that qualify as foreign states, such as access to federal court, 28 U.S.C. § 1441(d), the determination of factual issues by federal judges rather than juries, *id.* at §1330(a), and the right to special protections from pre-judgment attachment and execution, *id.* at §§1609-11. The fact that those protections will be extended to indirectly-held entities does not in any way address the separate inquiry whether such entities are among those that Congress wished to favor.

For these reasons, the ABA Working Group tasked with the study of the FSIA recommended making the plain

language of the statute even plainer, by providing that the FSIA "does not require direct majority ownership by a foreign state for an instrumentality to qualify for" foreign state status.[12] As the ABA Working Group recommended (*id.*):

> [P]resumptive sovereign immunity should apply to corporations indirectly majority owned by foreign states [because] at least some states structure important areas of national interest, such as natural resources, through several levels of corporations. The strength of a foreign state's sovereign interests in an area do not necessary dissipate when employing more complicated legal structures resembling those used by modern private businesses.

This observation could have been written with ICI in mind, where any contention that the Irish government's ownership interest in ICI is somehow attenuated due to the fact that a nominee company holds legal title to most of ICI's shares entirely puts form ahead of substance. All of ICI's shares are ultimately held for the benefit of the pertinent Irish Minister. Quite simply, the Irish government owns ICI. This Court should reject any construction of the FSIA that would conclude otherwise.

IV. A Substantive Rather Than a Formalistic Approach Offers a Better Solution to the Issue of Tiered Ownership Under the FSIA.

Especially in circumstances where plain-text arguments raise honest differences, rigid adherence to a formalistic construction of a statute is ill-advised and scrupulous regard for the statute's underlying purpose becomes paramount.

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[12] *Recommendations and Report on the U.S. Foreign Sovereign Immunities Act*, Working Group of the Int'l Litig. Comm. of the Am. Bar. Ass'n, at 7 (October 2001).

Here, the Ninth Circuit has proffered no plausible policy argument why an entity should be excluded from the procedural protections of the FSIA solely because the foreign government has structured its ownership through an intermediary. To the contrary, that court has itself acknowledged that the better rule might be to include entities so owned. *Gates*, 54 F.3d at 1462. The better approach, we submit, is to require district courts to evaluate the factors that support or refute whether the foreign government has a genuine "majority" "ownership interest," regardless of how structured, rather than apply an inflexible antitiering rule.

The district courts are fully capable of assessing whether the foreign government has a true proprietary interest in the particular entity or whether its connection to the entity is entirely incidental and without indicia of genuine ownership. It is, after all, ownership that Congress set as its test. The test is not legal structure, not governmental purpose,[13] not day-to-day participation in the entity's affairs, not even control, although majority ownership may represent the power to control. The district courts are fully capable of determining whether the foreign government holds an actual majority ownership interest. The courts could deny instrumentality treatment where, for instance, the government for reasons peculiar to its system of laws holds full legal title to the entity but the beneficial interest is entirely in private hands. It can give due consideration to any expressions by the government of how it perceives its ownership interests in the entity in circumstances where its own laws and local circumstances have dictated the adoption of an indirect legal structure. All such considerations are well within the purview of the district courts in determining in specific circumstances what actually

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[13] There is a separate test that does look to the governmental purpose of the entity in question, the "organ" test of §1603(b)(2), but that test is not at issue in *Patrickson*.

constitutes "majority ownership." No mechanical rule is needed, particularly none based on parochial notions of U.S. corporate law.

We do not presume to speak for the parties in the instant case as to how such factors apply to the Dead Sea companies, although it is difficult to see how the mere use of a tiered structure can obscure the fact the Israeli government owned well in excess of the majority interest in these companies. We simply suggest that no mechanical rule should be adopted under the guise of statutory interpretation that looks to form rather than substance. As a consequence, we urge that the Court reject any invitation to construe the statute so as to exclude an entity like ICI from treatment as a government-owned instrumentality under the FSIA.

CONCLUSION

For the foregoing reasons, *amici curiae* the Republic of Ireland and Icarom, plc (Under Administration) urge that the decision below be reversed.

Respectfully submitted,

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